TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 11

HERMAN LIVERIGHT, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 16, 1960

CERTIORARI GRANTED JUNE 19, 1961

SUPREME COURT OF THE UNITED STATES

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HERMAN LIVERIGHT, PETITIONER,

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INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the District of Columbia Circuit		
Opinion, Burger, J.	1	1
Judgment	12	10
Clerk's certificate (omitted in printing)	13	10
Order extending time to file petition for writ of certiorari	14	11
Order allowing certiorari	15	11
Order granting motion to dispense with printing of record	16	12

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[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13871

HERMAN LIVERIGHT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Columbia

Mr. Harry I. Rand for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, Carl W. Belcher, Lewis Carroll, and Harold D. Rhynedance, Jr., Assistant United States Attorneys, were on the brief for appellee. Mr. John D. Lane, Assistant United States Attorney, also entered an appearance for appellee.

Before Washington, Bastian and Burger, Circuit Judges.

OPINION—Decided June 18, 1960

BURGER, Circuit Judge:

Appellant was convicted after jury trial on 14 counts of a 15 count indictment for refusing to answer pertinent questions before the Internal Security Subcommittee of the [fol. 2] Committee on the Judiciary of the United States Senate.* The questions were asked during the course of an executive session and later at a public hearing before the

* The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13464, Gojack v. United States, decided this day.

Subcommittee.[1] Appellant was sentenced to three months [fol. 3] imprisonment and a fine of $500. Conviction on any one of these counts would sustain such a sentence.

The hearings at which appellant appeared were part of a Senate investigation which had been in progress for 5

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[1] Indictment questions were as follows:

Count 1: "Are you now an active Communist?"

Count 2: "Have you been membership director of the Thomson-Hill branch of the Communist Party in 1943?"

Count 3: "Are you now a Communist?"

Count 4: "Have you ever been a member of the Communist Party?"

Count 5: "Were you sent on a mission for the Communist Party into the South?"

Count 6: "Have you affiliated with a Communist cell in the city of New Orleans, composed of professional people?"

Count 7: "Were there Communist meetings in your home at 333 Ware Street, in New Orleans?"

Count 8: "State whether or not you were at one time membership director of the Thomson-Hill branch of the Communist Party?"

Count 9: "We have information, sir, and we desire to know how this conspiracy is financed, that you have given money to the Communist Party on various occasions. State whether that is true or untrue."

Count 10: "In 1952, did you and your wife rent a post-office box in White Plains, New York?"

Count 11: "Did you attempt to rent a post-office box in White Plains, N.Y., under the name of the Westchester County Committee for Ethel and Julius Rosenberg?"

Count 12: "Is it not a fact that you sent those children away from home, from your home, in order to have a meeting in your home of a Communist cell, and you did not want your children to see the people in the city of New Orleans who belonged to this cell?"

Count 13: "When did you join the Communist Party, Mr. Liveright?"

Count 14: "Did word come to you from the Communist leadership in New York after you affiliated, to stay clean in New Orleans?"

Count 15: "Mr. Liveright, is your wife a member of the Communist Party?"

The indictment was laid under 2 U.S.C. § 192 (1958).

years or more under the authority of Senate Resolution 366, 81st Congress, 2d Sess. (1950),[2] concerning the operation and enforcement of the Internal Security Act of 1950, of laws relating to espionage and sabotage and the extent, nature and effects of subversive activities and infiltration by foreign controlled persons into various areas of American life.

The volunteered testimony of Winston M. Burdett, a [fol. 4] prominent foreign correspondent and radio and TV newscaster, who appeared before the Subcommittee in 1955, had disclosed to the Subcommittee a widespread effort of the Communist Party to place persons under its discipline in positions of key importance in newsgathering and news dissemination media, including radio, television and newspapers. Burdett, before renouncing Communism and the Communist Party had served, among other capacities, as a courier for the Communist apparatus. Burdett gave the Subcommittee names and details of Communist Party infiltration, activities and techniques. Burdett did not give information about appellant.

When appellant appeared before the Subcommittee, he was represented by counsel shown by the record to be familiar with such work before the Internal Security Subcommittee. Prior to the hearing, appellant's counsel had conferred with counsel for the Subcommittee. Appellant was first questioned briefly in executive session where he refused to answer questions as to Communist Party mem-

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[2] Senate Resolution 366 reads in part:

"*Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

bership and activities. He submitted a lengthy statement of the alleged legal and constitutional basis for his refusal to answer questions.[3]

The public hearing was held the same day appellant refused to answer questions in executive session. Almost without exception the indictment count questions were followed by consultation by appellant with counsel and as to [fol. 5] all of them the written statement of objections was expressly made the basis for refusal to answer.[4]

While appellant always relied on his formal statement of objections he occasionally paraphrased the objection in exchanges with the Chairman or counsel. Typical is the following:

> "I respectfully object to the power and jurisdiction of this subcommittee to inquire into my political beliefs, into any other personal and private affairs, and into my associational activities.
>
> I am a private citizen engaged in work in the field of communication.

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[3] The statement is similar in substance to one given the Subcommittee by another witness, William A. Price, who appeared in hearings represented by Philip Wittenberg, the lawyer who appeared with appellant. Among other things the objection stated: "The Congress of the United States has no constitutional right to legislate with regard to prior restraint on utterance; no ex post facto law can be passed determining innocence or criminality, and therefore any investigations into my speech or communications is beyond the power of this committee . . . ." S. Rep. No. 1766, 84th Cong., 2d Sess., p. 20 (1956).

[4] Appellant's reliance on his counsel is further indicated by the colloquy at the close of his appearance:

"Chairman Eastland. Is there anything else?
"Mr. Morris. Not of this witness, Senator.
"Chairman Eastland. That will be all.
"Mr. Liveright. Thank you, sir.
"Chairman Eastland. Mr. Wittenberg, in the event that we may have to have Mr. Liveright testify again, may we do so by calling you instead of subpenaing him?
"Mr. Wittenberg. Yes, if you will give me enough time and remember that he is down in New Orleans.
"Mr. Morris. Oh, we understand that. You will supply him rather than have us subpena him again?
"Mr. Wittenberg. Oh, surely." *Id.* at 17-18.

The grounds of my objection are as follows:

Any investigation into my political beliefs, any other personal and private affairs, and my associational activities, is an inquiry into personal and private affairs which is beyond the powers of this subcommittee. I rely not upon my own opinion but upon statements contained in the opinions of the Supreme Court of the United States.

Among others, in United States against Rumely, 345 United States ——." S. Rep. No. 1766, 84th Cong., 2d Sess. at p. 10 (1956).

Appellant challenges his conviction on multiple grounds:

1. The charter of the Subcommittee is not based on a legislative purpose which justifies impairment of [fol. 6] First Amendment rights.
2. The subject matter of the hearings was not made known to appellant.
3. The pertinency of the questions to any disclosed legislative purpose was not revealed to appellant with the required clarity.
4. The Subcommittee could not invade appellant's First Amendment rights to secure information which it already had in its possession.
5. The Subcommittee had no basis to subpoena appellant and it was reversible error to refuse to permit production of Senate records which contained the information relied on in calling appellant as a witness and error to deny appellant's demand to cross examine as to the sources of the Senate's information.
6. The Subcommittee was not lawfully constituted and even if it was it could not lawfully meet while the Senate was in session without special consent of the Senate, under 2 U.S.C. § 190b(b) (1958).
7. The issue of pertinency of the questions should have been submitted to the jury.

Other assigned errors have been carefully considered but do not warrant discussion.

(1) As to appellant's first contention we hold that the charter of the Subcommittee rests on a broad but specifically described legislative purpose, namely the operation of internal security laws which Congress considered in need of constant legislative surveillance due to constantly changing Communist Party techniques as well as infirmities in the statutes. Specifically such witnesses as Burdett had made Congress aware of the Communist Party strategy of placing its disciples in key positions in the fields of communications, newsgathering and reporting, education and other areas in which public opinion could be influenced. This subject was within the Subcommittee's power to investigate. The responsibility and [fol. 7] power of the Congress to pursue such inquiries is not open to doubt. Any possible interference with First Amendment rights is outweighed by the vital national interests at stake in the subject of the inquiry. See *Barenblatt* v. *United States,* 360 U.S. 109 (1959); *Shelton* v. *United States,* No. 13737 (D.C. Cir., June 18, 1960).

(2) As to the second contention that the subject was not made known to appellant, the record shows appellant's counsel conferred with Subcommittee counsel and both appellant and his counsel exhibited awareness of the subject of inquiry. At the opening of the public hearing Subcommittee counsel made a statement[5] as to the subject

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[5] "Mr. Chairman, before commencing the interrogation of this particular witness this afternoon, I would like to restate again for the record the purpose of the particular series of hearings being held by the Internal Security Subcommittee. I read now from the opening statement of the chairman:

'We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures.

• • • •

'We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and the composition of our own Government here, as the facts bearing

[fol. 8] and purpose of the hearing and from time to time counsel or the Chairman added additional information by way of explanations[6] of pertinency in an effort to persuade [fol. 9] appellant to answer.

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on these issues are gathered in the public record of this subcommittee which will enable it to make recommendations or determinations as to whether the Internal Security Act of 1950 and other existing law should be repealed, amended or revised, or new laws enacted.'

"This witness is being called here this afternoon, Senator, in the course of that particular set or series of hearings." S. Rep. No. 1766, 84th Cong., 2d Sess., pp. 6-7 (1956).

[6] "Mr. Morris: Mr. Chairman, this committee has been informed that Mr. Liveright and his wife were active in the Communist Party of New York City, and that at the time and date they moved to the South, they were formally asked by their Communist Party superiors to keep away from formal associations with the Communist Party at that time in their activities." *Id.* at 12.

• • • •

"Chairman Eastland: The question [Have you ever been a member of the Communist Party?], Mr. Liveright, is very pertinent. We are attempting to see what amendments are needed to the Internal Security Act. In addition, and as a part of that, *we are tracing the activities of the Communist Party in this United States.*

"Our information is, sir, *that you were sent South and placed there with your wife on a mission for the Communist Party,* and were told by your superiors not to become involved with a Communist cell that was a professional group in the city of New Orleans, *but the word was used by your superiors to stay clean.*

"Now, is that true? Were you sent on a mission for the *Communist Party into the South?*" (Emphasis added.) *Id.* at 13.

• • • •

"Chairman Eastland: Mr. Liveright, the Communist movement, with which we have information that you are affiliated, sir, is a conspiracy against your country. . . . *We have information, sir, and we desire to know how this conspiracy is financed, that you have given money to the Communist Party on various occasions. State whether that is true or untrue.*" (Emphasis added.) *Id.* at 15.

• • • •

"Chairman Eastland: It seems that if you had not participated in this conspiracy and if you had not helped finance it, that you would be very glad to answer that question, Mr. Liveright." *Ibid.*

• • • •

"Chairman Eastland: You have the opportunity now to help your country by just frankly answering the questions and telling

The questions in context, appellant's responses to them, his statement of "objections" and the record as a whole disclose plainly and beyond dispute the subject of the investigation to be Communist Party tactics, infiltration and penetration into geographical areas and into particular professional groups including communications media. Assuming, arguendo, that the subject covered by the Senate Resolution was, in this case, not sufficiently specific and concrete to inform appellant of the subject under inquiry, the opening statement to him carefully pointed out at least one narrow and specific area or subject of inquiry. That limited area was defined as "the structural revisions that the Communists have made in their network in order to avoid detection, and . . . to trace the movement of individual agents through these changing structures."[7] This was pinpointed by telling him what had been reported to the Subcommittee about his "mission South" and the questions[8] related directly to this subject. See footnote 6, *supra*.

(3) The pertinency of the specific questions to this plainly revealed subject of inquiry is obvious from the questions themselves and from appellant's formal objections and his comments. Additionally the Chairman and his counsel explicitly spelled out their pertinency in their effort to persuade appellant to cooperate. See footnote 6, *supra*.

(4) The fact that the Subcommittee may have had every [fol. 10] item of information concerning which appellant was interrogated does not reduce its right or power to seek confirmation directly from him. Moreover, appellant was entitled to an opportunity to refute or explain the information and reports about him before those activities possibly became the subject of any public reports the Subcommittee might make. Nor is it a bar to interrogation

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us the truth, to enable us to— * * * draft legislation to protect the welfare and the safety of our country. And it appears that you would be most anxious, Mr. Liveright, to do that. Most Americans would." *Ibid.*

[7] S. Rep. No. 1766, 84th Cong., 2d Sess., p. 6 (1956).

[8] See Indictment Counts 3, 5, 6, 7, 9, 12, 14, footnote 1, *supra*.

at a public hearing that appellant was asked and refused to answer some or even all of the same questions in executive sessions. Cf. *Young* v. *United States*, 94 U.S. App. D.C. 54, 212 F.2d 236, *cert. denied*, 347 U.S. 1015 (1954).

(5) The argument that appellant is entitled to see and cross examine concerning the information which led the Subcommittee to issue a subpoena for him is without any merit on this record. It is plain here, as in *Barenblatt*, that the Subcommittee did not call appellant as part of a "broadside" or "dragnet" process. From various confidential sources, which Committee counsel testified they had found reliable in the past, there were strong indications[9] that appellant may have engaged in Communist Party activities of the particular kind which the counsel stated were under special scrutiny, *i.e.*, "structural revisions . . . in their network in order to avoid detection." If the information received by the Subcommittee concerning appellant's activities was true, his actions were not of a character protected by the First Amendment.

(6) Whether a Senate Subcommittee meets for inquiry purposes while the Senate is in session without prior consent of the Senate is not a matter available to appellant as a defense to his actions. Any infirmity in the conduct [fol. 11] of the hearings in this respect was cured by the Senate action in citing appellant for contempt.[10]

(7) The pertinency of the questions to the subject matter is not for the jury but for the court and as we have indicated, the court decided the issue correctly. *Sinclair* v. *United States*, 279 U.S. 263 (1929); *Keeney* v. *United States*, 94 U.S. App.D.C. 366, 218 F.2d 843 (1954). The suggestion that there was a design to multiply the offenses

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[9] Indeed item 1—the signing of Communist Party nominating petitions—was presumably available on the public record and appellant does not challenge that he did so sign, giving some indication that the other reports on appellant might be true.

[10] Moreover, Senate Resolution 366, the basic enabling Resolution, specifically authorizes the subcommittee "to sit and act at such places and times *during* the sessions, recesses, and adjourned periods of the Senate, . . . as it deems advisable."

by pursuing a line of questioning which appellant showed he would not answer is without merit. The courts will not permit a contumacious witness to bootstrap himself into immunity by his own recalcitrance.

As we have pointed out, the sentence imposed by the District Court on appellant would be sustainable even though appellant had been convicted on any one count of the indictment.

Affirmed.

[fol. 12] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,871

Criminal 1212-56

HERMAN LIVERIGHT, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: Washington, Bastian and Burger, Circuit Judges.

JUDGMENT—June 18, 1960

This Cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideration Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Burger.

[fol. 13] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 14]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1960

HERMAN LIVERIGHT, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—July 13, 1960

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 17th, 1960.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 13th day of July, 1960.

[fol. 15]

SUPREME COURT OF THE UNITED STATES

No. 328—October Term, 1960

HERMAN LIVERIGHT, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—June 19, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Cir-

cuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 300.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 16]

SUPREME COURT OF THE UNITED STATES

No. 11—October Term, 1961

HERMAN LIVERIGHT, Petitioner,

vs.

UNITED STATES.

ORDER GRANTING MOTION TO DISPENSE WITH PRINTING OF RECORD—October 9, 1961

On Consideration of the motion of petitioner to dispense with printing the record,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Supreme Court of the United States

October Term, 1960

No. [redacted]

HERMAN LIVERIGHT,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARRY I. RAND,
1501 Broadway,
New York 36, N. Y.,

LEONARD B. BOUDIN,
25 Broad Street,
New York 4, N. Y.,

Attorneys for Petitioner.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statute and Resolution Involved	4
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	20
APPENDICES:	
A. Opinion of United States Court of Appeals..	21
B. Judgment	32
C. Statutory Provisions and Senate Resolution	33

CITATIONS

Cases

Barenblatt v. United States, 360 U. S. 109..2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17	
Barenblatt v. United States, 102 U. S. App. D. C. 217, 252 F. 2d 129, aff'd 360 U. S. 109	10
Bowers v. United States, 92 U. S. App. D. C. 79, 202 F. 2d 447	13
Braden v. United States, cert. gr., No. 54, O. T. 1960	19
Cristoffel v. United States, 338 U. S. 84	17
Dennis v. United States, 339 U. S. 162	19
Deutch v. United States, pet. cert. pend., No. 233, O. T. 1960	20
Flaxer v. United States, 358 U. S. 147	9

PAGE

Gojack v. United States, No. 13464, C. A. D. C., June 18, 1960 20

Henry v. United States, 361 U. S. 98 15

Jordan v. DeGeorge, 341 U. S. 223 9

Lanzetta v. New Jersey, 306 U. S. 451 9

Price v. United States, pet. cert. pend., No. 13925 C. A. D. C. 20

Russell v. United States, pet. cert. pend., No. 239, O. T. 1960 20

Sacher v. United States, 356 U. S. 576 ..... 11, 13, 15
Scull v. Virgina, 359 U. S. 344 9
Shelton v. United States, No. 13737, U. S. C. A. D. C., June 18, 1960, pet. cert. pend. No. 246, O. T. 1960 ..... 7, 8, 13, 20
Sinclair v. United States, 279 U. S. 263 ..... 2, 16
Smith v. People of the State of California, 361 U. S. 147 18
Sweezy v. New Hampshire, 354 U. S. 234 ..... 2, 8

United States v. Harriss, 347 U. S. 612 18
United States v. Lamont, 18 F. R. D. 27 (S. D. N. Y.), aff'd 236 F. 2d 312 (2d Cir.) 19
United States v. Orman, 207 F. 2d 148 (3d Cir.) 16
United States v. Peck, 154 F. Supp. 603 (D. D. C.) .. 8
United States v. Rumely, 345 U. S. 41 ..... 2, 8, 13, 18

Watkins v. United States, 354 U. S. 178 ..... 2, 9, 12
Whitman v. United States, pet. cert. pend., No. —, O. T. 1960 20
Wilkinson v. United States, cert. gr., No. 37, O. T. 1960 19
Winters v. New York, 333 U. S. 507 9

PAGE

Miscellaneous

100 Cong. Rec. 843 7

Legislative Reorganization Act of 1946:

Sec. 133 (2 U. S. C. 190a) 3, 17

Sec. 134 (2 U. S. C. 190b) 3, 17

Senate Resolution 366, 81st Cong., 2d Sess. 2, 7

2 U. S. C. 192 .....3, 4, 16, 18, 19

28 U. S. C. 1254(1) 1

Supreme Court of the United States

October Term, 1960

No.

HERMAN LIVERIGHT,

Petitioner,

against

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Herman Liveright respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 18, 1960, affirming petitioner's conviction in the United States District Court of the District of Columbia for contempt of Congress under 2 U. S. C. 192.

Opinions Below

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 136-146) has not yet been reported; it appears as Appendix A to this petition, *infra*, p. 21.

Jurisdiction

The judgment of the Court of Appeals was entered on June 18, 1960 (R. 147; Appendix B, *infra*, p. 32). On July 13, 1960, Mr. Justice Black extended the time to file this petition to August 17, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether Senate Resolution 366, 81st Cong., 2nd Sess., the charter of authority of the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate (hereafter "the Subcommittee"), is so vague as to invalidate the Subcommittee's power to compel testimony in the First Amendment area.

2. Whether, when petitioner failed to answer the questions as to which he has been convicted for contempt, the Subcommittee was engaged on a "topic under inquiry" sufficiently identified and of which petitioner was adequately apprised, within the requirements formulated by this Court in *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234; and *Barenblatt* v. *United States*, 360 U. S. 109.

3. Whether, in any event, the Government sustained the burden imposed on it by this Court in *United States* v. *Rumely*, 345 U. S. 41, and *Sinclair* v. *United States*, 279 U. S. 263, of showing that there was a particular "topic under inquiry" on which the Subcommittee was at that time engaged.

4. Whether the Government sustained the burden imposed on it by this Court in *Barenblatt* v. *United States*, *supra*, and *Sweezy* v. *United States*, *supra*, of showing why petitioner's right of privacy must yield to subordinating governmental interests.

5. Whether the Government sustained the burden imposed on it by this Court in those cases, of showing probable cause for the Subcommittee's summoning of petitioner as a witness and compelling his testimony in the First Amendment area.

6. Whether petitioner was denied the full and fair hearing and right of cross-examination guaranteed a defendant in a criminal case by the Fifth and Sixth Amendments.

7. Whether, since evidence *aliunde* was introduced to prove pertinency of the questions put to petitioner to the "topic under inquiry", the issue as to their pertinency should have been submitted to the jury.

8. a. Whether Senator Eastland, before whom the contempts charged to petitioner were allegedly committed, constituted a competent committee of the Senate within the purview of 2 U. S. C. 192, in light of the provision of section 134(c) of the Legislative Reorganization Act of 1946 that no Senate committee sit without special leave while the Senate is in session and the fact that Senator Eastland sat while the Senate was in session and without special leave.

b. Whether Senator Eastland constituted a competent committee of the Senate during the executive session at which two of the charged contempts allegedly occurred, in light of the provision of section 133(f) of the Legislative Reorganization Act of 1946 that all Senate committee hearings be open to the public except where the committee by majority vote orders an executive session and the fact that the executive session here was not so ordered.

9. Whether an investigation by a Congressional committee into the "Communist Party strategy of placing its disciples in key positions in the fields of communications, newsgathering and reporting, education and other areas in which public opinion could be influenced" violates the freedoms guaranteed by the First Amendment.

10. Whether petitioner was properly convicted under 2 U. S. C. 192, in view of the failure of the indictment to state (a) what the "topic under inquiry" before the Subcommittee was at the time of the alleged contempts, (b) how the questions with respect to which contempts were charged were pertinent to that subject matter, and (c) that petitioner's failure to answer them was willful.

11. Whether a defendant in a 2 U. S. C. 192 prosecution should be accorded the right to show the bias of Federal Government employee jurors and, on such a showing, to have an indictment returned by a grand jury composed in the majority of such jurors dismissed and such jurors excused for cause from service on the petit jury.

Constitutional Provisions, Statute and Resolution Involved

The Constitutional provisions involved are Article I, sections 1 and 9, clause 3; Article III, section 1; and the First, Fifth, Sixth, Ninth and Tenth Amendments.

The statutes involved are 2 U. S. C. 192, as amended (R. S. Sec. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) and 2 U. S. C. 190a and 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753, Title I, §§ 133, 134(a), (c), 60 Stat. 831 *seq.*). Senate Resolution 366, 81st Cong., 2d Sess., is also involved. The statutes and resolution involved are set forth in Appendix C, *infra*, p. 33.

Statement of the Case

Petitioner, a director of a television station in New Orleans, was indicted on November 26, 1956, for refusal to answer questions put to him in hearings held on March 19, 1956, before Senator Eastland alone, purportedly sitting as the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary of the United States Senate (hereinafter "the Subcommittee") (R. 1-3). The questions primarily inquired into whether petitioner was or had been associated with the Communist Party (*Ibid.*).

Subpoenas issued prior to the trial, at petitioner's request, directed the Subcommittee's chief counsel and the

Senate Clerk to produce all records in the files of the Subcommittee and its parent Committee on the Judiciary relating to petitioner, and the Subcommittee's minute books covering certain of its proceedings (R. 8-9). On the Government's motion, however, these were quashed by the trial court (R. 50-53), and petitioner's plea that the court request the Subcommittee and the Senate to permit inspection of the subpoenaed records was also denied (R. 50-53). Petitioner's motion that, in view of these rulings, the indictment be dismissed for want of opportunity to make a full and fair defense was denied (R. 53).

The case was tried to a jury, from which the court refused to disqualify Federal Government employee jurors (R. 10). At the opening of the trial, over petitioner's objections, the court ruled that the issues (a) as to pertinency of the questions, refusal to answer which was charged as contempt, and (b) as to the competence of the Subcommittee at the time of the inquiry, were for the court and that no testimony relating to those issues might be adduced before the jury (R. 53-54).

The Government's chief and only material witness was Mr. Robert Morris, the Subcommittee's chief counsel. Before the jury, Mr. Morris read the transcript of petitioner's testimony; out of the jury's hearing, he testified with respect to (a) information allegedly in the Subcommittee's file which, so Mr. Morris testified, caused it to call petitioner as a witness, and (b) the purposes of the Subcommittee's inquiry (R. 54-123, *passim*). A substantial part of this latter information, he said, had come from a "confidential informant" (R. 100). When petitioner sought to cross-examine as to its source or to inspect the information, the trial court barred him from doing so (R. 97-98, 100, 117). Petitioner's motion that Mr. Morris' testimony in this regard therefore be stricken was denied (R. 123-125).

Opening his case, petitioner vainly reiterated his request for enforcement of the subpoenas issued to the Subcommittee and its parent committee (R. 127). From the subpoenaed materials, petitioner offered to prove *inter alia* that, in its inquiry, the Subcommittee was not engaged in a legislative purpose but solely in harassing petitioner and exposing him to the contempt of his associates and the public; that the Subcommittee was not acting with the least possible power commensurate with legislative purposes; and that petitioner's First Amendment rights had been impaired without justification (R. 127-129).

Petitioner's renewed motion for acquittal was denied (R. 130-131). Over his exceptions, the court submitted the case to the jury, charging as matters of law (a) that the Subcommittee was, at the time and place of the inquiry, a duly constituted committee of the Senate inquiring into a matter within duly delegated authority and (b) that the indictment questions were pertinent to the subject then under inquiry by the Subcommittee (R. 131-134). The court left to the jury only the issues (1) whether the indictment questions had been put to petitioner, (2) whether petitioner had refused to answer them, and, if so (3) whether his was a wilful refusal (R. 132).

The jury returned a verdict of guilty on each of the counts submitted to them, Counts 1 through 14. On March 22, 1957, the trial court entered a judgment of guilty and imposed sentence of a $500 fine and three months imprisonment (R. 12).

Notice of appeal to the Court of Appeals was filed on March 22, 1957 (R. 12). Before hearing argument, that Court awaited this Court's ruling in *Barenblatt* v. *United States*, 360 U. S. 109. On June 18, 1960, the Court of Appeals affirmed the conviction (R. 147). Subsequently, it entered orders staying transmission of its judgment to the trial court pending the filing of this petition.

Reasons for Granting the Writ

1. This case presents to this Court for the first time the question whether Senate Resolution 366, 81st Cong., 2d Sess. (Appendix C, *infra*, p. 34), the grant of authority to the Internal Security Subcommittee of the Senate, is so vague as to invalidate that Subcommittee's power to compel testimony in the First Amendment area. In *Barenblatt* v. *United States*, 360 U. S. 109, although critical of the ambiguity of the House resolution there in question, the Court refused to declare the charter of the House Committee on Un-American Activities "constitutionally infirm on the score of vagueness" (*Id.* at 122-123). That charter was, however, quite different. And the "persuasive gloss of legislative history" (*Id.* at 118-122) impelled the Court to overlook its concededly vague terms. Here, on the other hand, we are concerned with Senate Resolution 366, a more ambiguous charter, and we are not aided by cogent legislative history. The Court below errs therefore when it concludes that "[w]hatever may have been argued at one time as to possible infirmities or vagueness in Resolution 366 under which the [Sub]committee was acting, the *Barenblatt* case and the legislative gloss attached to the Resolution has put this issue to rest." *Shelton* v. *United States*, No. 13737, June 18, 1960, slip op. 7, pet. for cert. pending, No. 246, O. T. 1960.

The utter hopelessness of attempting definition of the Subcommittee's authority from the terms of its authorizing resolution has been frankly conceded by one of its most vigorous champions, its former chairman, Senator Jenner (100 Cong. Rec. 843; emphasis supplied):

> I say the Subcommittee on Internal Security was set up by resolution primarily to look after the internal security of the United States. However, *it must be realized that it is hard to draw a line indicating where the subject begins and where it ends.*"

Indeed, subparagraph (3) of Resolution 366, which the court below finds especially explicit (*Shelton* v. *United*

States, supra, slip op. 6), embodies a grant of power markedly similar to that in the New Hampshire enabling resolution which this Court struck down in *Sweezy* v. *State of New Hampshire,* 354 U. S. 234. The power in the Subcommittee to investigate "the extent, nature and effects of subversive activities in the United States" (Appendix C, *infra,* p. 35) is patently quite the same as that vested in the New Hampshire legislature to investigate "with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said Act are presently located within this state". *Id.* at 236. Such a mandate, this Court said, is so "sweeping and uncertain" that it affords no "assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed when it initiated this inquiry. The judiciary are thus placed in an untenable position * * *." *Id.* at 253, 254. See, also, *United States* v. *Peck,* 154 F. Supp. 603 (D. D. C.), where, on such grounds, Judge Youngdahl held Resolution 366 void for vagueness.

The effort of the lower court to dispel the obscurity of the Senate resolution by resorting to a "legislative gloss" (*Shelton* v. *United States, supra,* at p. 7) is totally unjustified. In *Barenblatt,* where the court employed such a rule of construction, the witness, Dr. Barenblatt, had appeared before the House committee (in 1954) when that committee had been actively operating for some sixteen years. In contrast, petitioner here appeared before the Senate Subcommittee, in 1956, when the Subcommittee had been in existence only five years. There is no such "persuasive legislative gloss" in this case as characterized *Barenblatt.* Nor may we, as does the court below (see *Shelton* v. *United States, supra,* at pp. 6-7), import, as aid to definition, the Subcommittee's history *subsequent* to 1956. For, that history has the "infirmity of *post-litem motam,* self-serving declarations". *United States* v. *Rumely,* 345 U. S. 41, 48. We are concerned here not with

the authority of the Subcommittee in *abstracto*, but its authority as communicated to the witness required to choose whether to submit to the inquiry impairing his First Amendment rights or to remain silent at the risk of contempt. It will not do to charge that witness with a "legislative gloss" derived from a history subsequent to the time of his appearance. As the Court said in *Scull* v. *Virginia*, 359 U. S. 344, 359:

> "* * * the record shows that the purposes of the inquiry, as announced by the Chairman, were so unclear, in fact conflicting, that Scull did not have an opportunity of understanding the basis for the questions or any justification on the part of the Committee for seeking the information he refused to give. See *Watkins* v. *United States*, 354 U. S. 178, 208-209, 214-215. To sustain his conviction for contempt under these circumstances would be to send him to jail for a crime he could not with reasonable certainty know he was committing. This Court has often held that fundamental fairness requires that such reasonable certainty exist. See *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453; *Jordan* v. *De George*, 341 U. S. 223, 230; *Watkins* v. *United States*, 354 U. S. 178, 208-209, 214-215, 217; *Flaxer* v. *United States*, 358 U. S. 147, 151. Certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press, and association for fear of violating an unclear law. *Winters* v. *New York*, 333 U. S. 507. Such is plainly the case here."

In *Barenblatt*, this Court announced that it "will always be on the alert against intrusion by Congress into this constitutionally protected domain". 360 U. S. at 112. Alertness compels the grant of a writ in this case.

2. This case also presents the important question whether, when they indulge in an investigation intruding into the First Amendment area, Congressional committees must engage on a specifically delimited subject of inquiry, which is communicated to the witness, rather than on

merely a general, roving inquisition. This Court's prior decisions appear to require such a particularization of subject matter; the court below is of a contrary view. Resolution of the problem is vitally necessary to protection of First Amendment freedoms.

In this case, petitioner could not be "sufficiently apprised of 'the topic under inquiry'" (*Barenblatt*, 360 U. S. at 124) for a simple reason: there was no such particular topic in which the Subcommittee was then engaged. Petitioner's position is thus quite different from the witness' in *Barenblatt*. There, (a) the "subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education"; (b) just prior to the witness' appearance, the scope of the day's hearings had been announced with even greater particularity; (c) the witness had heard the House Committee interrogate another witness, Crowley, "along the same lines as he was evidently to be questioned"; and (d) the witness "had listened to Crowley's testimony identifying him as a former member of an alleged Communist student organization." *Id.* at 124-125. Neither of these conditions was present in this case; thus petitioner enjoyed no such elaborate notification of subject matter as was afforded in *Barenblatt*.

(a) First, no statement whatever as to subject matter was made prior to or during the executive hearing of the Subcommittee, at which the Counts 1 and 2 questions were put to petitioner (R. 64, 17-21). The statement subsequently made by Mr. Morris, Subcommittee counsel, at the public session (R. 21-22) was broad, all-encompassing and little more than a rehash of the vague authorizing resolution. Cf. *Barenblatt* v. *United States*, 102 U. S. App. D. C. 217, 252 F. 2d 129, 136, aff'd 360 U. S. 109. As the Government admitted at the trial, that statement was "about as broad as the entire authority of the Committee" (R. 118). But the Subcommittee's "jurisdiction", which may be broadly stated, is a very different matter from the particular

"topic under inquiry", which must be reasonably precise if it is to guide the Courts and the witness. The distinction is fundamental.

That there was at no time a particular "topic under inquiry" is evidenced no more clearly than in the disparate definitions of that topic later suggested by Mr. Morris at the trial (see R. 77, 79, 87-88, 90, 92, 97, 101). His chameleon-like testimony recalls Mr. Justice Harlan's concurring opinion in *Sacher* v. *United States*, 356 U. S. 576, 578: "* * * For my part, it is abundantly evident that the pertinency of none of the * * * questions involved can be regarded as undisputably clear, as indeed is evidenced by the different interpretations of the record advanced by members of this Court and of the Court of Appeals who have considered this issue."

Finally, despairing of any meaningful definition, Mr. Morris conceded that, when it questioned petitioner, the Subcommittee had not in fact confined itself to any particular purpose (R. 112) but rather had deemed the "topic under inquiry" coextensive with the broad terms of its charter, however vague those might be (R. 112, 93-94, 101-102). The Government prosecutor was even more blunt: *"There is no such thing as a matter under inquiry, anything more narrow than the full powers of the Committee"* (R. 58, emphasis supplied). The trial court obviously concurred (R. 118).

On this record, the suggestion of the court below that Mr. Morris' statement at the public session "carefully pointed out at least one narrow and specific area or subject of inquiry * * * 'the structural revisions that the Communists have made in their network in order to avoid detection, and * * * to trace the movement of individual agents through their changing structures'" (Appendix A, *infra*, p. 29) is but judicial afterthinking. To indulge in such exercise is to strain to sustain, rather than to "be on the alert against intrusion by Congress into this constitutionally protected domain." *Barenblatt*, 360 U. S. at 112.

(b) Second, at no time, during either executive or open session, was the scope of the hearing announced with any degree of specificity or particularity approximating that with which it was communicated to the witness immediately prior to his appearance in *Barenblatt*.

(c) Third, petitioner heard no other witness testify before him, as did the witness in *Barenblatt*.

(d) Finally, petitioner listened to no witness identifying him as a member of a Communist organization, as did the witness in *Barenblatt*. (So far as the record shows, no witness has ever so identified petitioner.)

The short of the matter is, of course, that, in conducting the hearing in this case prior to the rulings in *Watkins* v. *United States*, 354 U. S. 178, and *Barenblatt*, neither the Subcommittee nor its counsel, Mr. Morris, gave any thought at all to the necessity, articulated in both those decisions, of telling the witness into what particular subject matter it was inquiring; for they considered it quite unnecessary that they do so. As was their then custom, they were embarked on a roving inquiry under the diffuse charter of the Subcommittee. Mr. Morris' subsequent effort and that of the court below to derive a "topic under inquiry" from the rambling record are but belated tries at a post-*Watkins* reformation. The fact is that no such subject matter marked this hearing. And even if the "actual scope of the inquiry" was somehow latent in the record, the Government certainly has not shown it "to have been luminous at the time when asked and not left, at best, in cloudiness". *Watkins* v. *United States*, *supra*, at 217 (Frankfurter, J. concurring). If "the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer". *Id.* at 214.

Review by this Court is necessary not only to correct the error below but to assure that the guides this Court

so conscientiously formulated in *Watkins* and *Barenblatt* for accommodating the power of the Congress and the rights of the individual are properly applied.*

3. In *Barenblatt*, the Court assumed the difficult function of balancing "the competing private and public interests at stake" (360 U. S. at 126) in cases such as the present one, recognizing the necessity for such a balancing to justify any invasion of the witness' constitutional rights. The task is a vital and delicate one, for the " 'subordinating interest of the State must be compelling' in order to overcome the individual constitutional rights at stake." *Id.* at 127. This essential function, however, was accorded little more than the lip service of passing mention by the court below.

The court below writes:

> "Any possible interference with First Amendment rights is outweighed by the vital national interests at stake in the subject of the inquiry" (Appendix A, *infra*, p. 27)

and, for exposition of those interests, merely refers to this Court's opinion in *Barenblatt* and its own in *Shelton* v. *United States*, *supra*. Those opinions, however, suggest no weighty national interests which could have been served by the investigation of petitioner here, and the record discloses none. More significantly, although the trial court, over petitioner's objection, permitted the Government's witness, Mr. Morris, freely to testify as to the purported

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* Beyond the need, on prosecution for contempt under 2 U. S. C. 192, to prove that the defendant was informed of the "topic under inquiry" at the time of the Congressional hearing, there is the need, equally vital, that the Government at trial independently prove that there was such a subject. For, otherwise, the vital element of pertinency cannot be established. *United States* v. *Rumely*, 345 U. S. 41; *Sinclair* v. *United States*, 279 U. S. 263; *Bowers* v. *United States*, 92 U. S. App. D. C. 79, 202 F. 2d 447; see, also *Sacher* v. *United States*, 356 U. S. 576. Here, however, the Government did not prove a particular subject matter; instead it denied the necessity for one.

information which led the Subcommittee to summon and interrogate petitioner and as to the purposes of the inquiry, the court quashed subpoenas directed to the Subcommittee and its parent committee designed to elicit such information, if any there was, and barred petitioner from cross-examining as to the sources of or inspecting such information. Thus petitioner was effectively thwarted from impeaching Mr. Morris' credibility and from demonstrating that the investigation was not in aid of any national interest.

Although *Barenblatt* sustained an inquiry as to "participation in or knowledge of alleged Communist Party activities at educational institutions" by the witness there (360 U. S. at 115), it pointed, in justification, to the prior testimony the House committee had received as to that witness' participation in activities of the Communist Party (360 U. S. at 125), the accuracy of which information was not questioned. This led the Court to conclude there that "petitioner's appearance as a witness [did not] follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful" to the House committee (360 U. S. at 134).

In the instant case, however, no evidence as to petitioner's alleged participation in the Communist Party was presented at the Subcommittee hearing. True, at the trial, Mr. Morris did testify that the Subcommittee had secured such information from "a very reliable informant • • • [O]ne whose information in the past proved to be so accurate that I would accept the information again" (R. 100); thus he sought to justify the subpoenaing and interrogation of petitioner (R. 77, 79). When, however, it was sought to cross-examine him as to the sources of this purported information, to ascertain whether Mr. Morris and his "informant" were credible witnesses and whether in fact such information did exist, the trial court, at the

Government's request, denied petitioner the opportunity to do so (R. 97-98, 100). Coupled with the court's earlier quashing of the subpoenas requiring production of the Subcommittee's records (R. 50-53), this constituted a complete bar to any effective inquiry into the purported reasons for the Subcommittee's summoning of petitioner and its interest in and need for interrogating him as to his private affairs.

This case thus initially presents the question whether, by such rulings, petitioner was denied the full and fair hearing and right to cross-examination that the Fifth and Sixth Amendments accord a defendant in any criminal action. As this Court said in *Sacher* v. *United States, supra*, 356 U. S. at 577:

> "• • • when Congress seeks to enforce its investigating authority through the criminal processes administered under the Federal judiciary the safeguards of criminal justice become operative".

Beyond that, it presents important and pivotal questions as to the quantum of proof which the Government must adduce to justify subordination of the individual interest in privacy of belief, opinion and association to that of the state in investigating in aid of legislation; and as to the nature and extent of the "probable cause" which, as this Court emphasized in *Barenblatt* (360 U. S. at 134), must exist to tip the scales in favor of the state. Cf. *Henry* v. *United States*, 361 U. S. 98.

If, as in this case, the First Amendment rights of the individual are to be subordinated merely on the surmise and *ipse dixit* of a Congressional committee's counsel, immunized even from cross-examination, then such precious rights will yield to any committee's announcement of suspicion and declaration that its investigation is legitimate. This is certainly not the meaning of *Barenblatt*. This Court's review is urgent to avoid so disastrous an extension of the *Barenblatt* ruling.

4. The decision below also raises important questions concerning the pertinency requirements of 2 U. S. C. 192. Although the Government, on trial of this case, offered considerable testimony on the issue of the pertinency of the indictment questions to the undefined subject of the Subcommittee's inquiry (see, *e.g.*, R. 75, 76, 77, 78, 79, 80, 81, 97-98, 99), the trial court refused to submit that issue to the jury (R. 53-54, 132).

The Sixth Amendment, however, requires that every element of a crime, including pertinency, be a matter for jury determination. The trial court did not withdraw the issue of "willfulness" from the jury; there was no reason to accord "pertinency" a lesser stature. So the Court of Appeals for the Third Circuit held in *United States* v. *Orman*, 207 F. 2d 148, where, as here, "evidence *aliunde* was introduced to prove pertinency" (at 156), correctly distinguishing *Sinclair* v. *United States*, 279 U. S. 263, as a case not involving any evidentiary dispute on that issue. The court below disagrees, holding that the "pertinency of the questions to the subject matter is not for the jury but for the court" (Appendix A, *infra*, p. 31).

This Court should resolve the conflict between the two courts of appeal. The frequency with which the question continues to arise in prosecutions under 2 U. S. C. 192, and this Court's ultimate responsibility for the uniform administration of Federal criminal law makes issuance of a writ necessary. If *Sinclair* is deemed indistinguishable and thus applicable here, the Court should reconsider the doctrine there announced in light of the provisions of the Sixth Amendment.

5. This case also presents questions, never before submitted to the Court, as to the construction of provisions of the Legislative Reorganization Act of 1946.

2 U. S. C. 192 contemplates a tribunal duly authorized to sit as a committee of the Congress at the time of the

contempt charged. For, a "tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction". *Christoffel* v. *United States*, 338 U. S. 84, 90. Senator Eastland, however, was not duly authorized and competent to sit as a committee, as he purported to do, when petitioner appeared before him. This for two reasons:

(a) Section 134(c) of the Legislative Reorganization Act of 1946 (Appendix C, *infra*, pp. 33-34) provides that "no • • • committee of the Senate • • • shall sit without special leave, while the Senate • • • is in session". The hearings at which petitioner is charged with contempt admittedly were held while the Senate was in session (R. 125-126) and without special leave granted by the Senate (R. 125).

(b) Section 133(f) of the Legislative Reorganization Act of 1946 (Appendix C, *infra*, p. 33) requires that all hearings conducted by Senate committees "shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session". The executive session during which the Counts 1 and 2 questions were put to petitioner was not ordered by majority vote but was convened solely on the decision of Senator Eastland (R. 96).

The Court below dismisses the infirmity resulting from section 134(c) of the Legislative Reorganization Act as "not a matter available to • • • [petitioner] as a defense to his actions" and in any event a matter "cured by the Senate action in citing • • • [petitioner] for contempt" (Appendix A, *infra*, p. 30). It does not address itself at all to the requirements of section 133(f). In these respects, the decision below poses serious and important questions never before presented or decided by this Court.

6. In *Barenblatt*, the Court held that the mandate of the House Committee on Un-American Activities did not violate the First Amendment as applied in an investigation

of communism in the field of education. While reserving our objections to that doctrine, it clearly does not support the ruling below. As already noted, the record does not disclose nor are we aware of the "topic under inquiry" here, but the court below sustains the Subcommittee's inquiry as an investigation into the "Communist Party strategy of placing its disciples in key positions in the fields of communications, news-gathering and reporting, education and other areas in which public opinion could be influenced" (Appendix A, *infra*, pp. 26-27); holding that "this subject was within the Subcommittee's power to investigate". *Ibid.*

When the court below so uncritically upholds a Congressional investigation into "areas in which public opinion could be influenced" by newspapers and other communications media, we submit it is urgent that this Court reexamine the *Barenblatt* doctrine and, at the very least, promptly place restrictions upon so radical an extension of the doctrine. For, to read Senate Resolution 366 so broadly is plainly to "violate the freedoms guaranteed by the First Amendment—freedom to speak, publish and petition the Government". *United States* v. *Harriss*, 347 U. S. 612, 625; *United States* v. *Rumely*, 345 U. S. 41. In this respect, the decision below conflicts in principle with the *Harriss* and *Rumely* cases.

7. Finally, this case presents two important problems recurring in prosecutions under 2 U. S. C. 192:

(a) The indictment (R. 1) fails to state what the "topic under inquiry" before the Subcommittee was at the time of the alleged contempt and how the indictment questions were pertinent to that subject matter. Both are elements of the crime charged. Nor does the indictment charge that petitioner's failure to answer the questions was willful. This is most significant even if "willful" does not involve a *mens rea*, as *Smith* v. *People of the State of California*, 361 U. S. 147, suggests it does. In any event, the

ruling below in these respects conflicts with the leading decision of Judge Weinfeld in the Second Circuit in *United States* v. *Lamont*, 18 F. R. D. 27, aff'd 236 F. 2d 312. This conflict should be resolved by this Court.

(b) Second is the question whether a defendant in a 2 U. S. C. 192 prosecution should be accorded the right to show the bias of Federal Government employee jurors and, on such a showing, to have an indictment returned by a grand jury composed in the majority of such jurors dismissed and such jurors excused for cause from service on the petit jury. Petitioner's efforts in these respects (R. 8, 10) were rebuffed by the trial court, apparently on the authority of this Court's decision in *Dennis* v. *United States*, 339 U. S. 162. In light of counsel's affidavit making an affirmative showing that personal bias and fear on the part of the jurors, found lacking in *Dennis* v. *United States*, *supra*, actually existed here, a re-examination of that decision and a review of the manner in which it has been applied by the lower courts are required.

8. The issuance of a writ in this case is particularly appropriate by reason of the prior grants of certiorari in *Wilkinson* v. *United States*, No. 37, O. T. 1960, and in *Braden* v. *United States*, No. 54, O. T. 1960; and its importance is emphasized by the pendency of other petitions in contempt of Congress cases decided by the court below on the same day as the instant case. Both *Wilkinson* and *Braden* present *inter alia* several of the questions which the present petition poses, but only in the context of the charter of authority granted to the House Committee on Un-American Activities. The pending petitions present similar questions, the context of the grant of power to the Senate Internal Security Subcommittee. This Court's review of these cases will permit consideration of these important constitutional issues in variant contexts and will go far toward resolution of such delicate problems

arising from the continually recurring conflict between the rights of the individual citizen and the interests of the Congress in investigating in aid of its legislative powers.*

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY I. RAND,
1501 Broadway,
New York 36, N. Y.,

LEONARD B. BOUDIN,
25 Broad Street,
New York 4, N. Y.,

Attorneys for Petitioner.

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* On June 18, 1960, the day on which the Court entered its judgment in the instant case, it affirmed convictions also in six other contempt of Congress cases which were considered simultaneously with the present case. Petitions for writs of certiorari in all but one of the other cases are now pending, and it is our understanding that a petition in the remaining case will shortly be filed. Pending petitions: *Deutch* v. *United States*, No. 233, O. T. 1960; *Russell* v. *United States*, No. 239, O. T. 1960; *Shelton* v. *United States*, No. 246, O. T. 1960; *Whitman* v. *United States*, No. —, O. T. 1960. Petitions shortly to be filed: *Price* v. *United States*, No. 13925, C. A. D. C.; *Gojack* v. *United States*, No. 13464, C. A. D. C.

Appendix A

(Opinion of United States Court of Appeals for the District of Columbia Circuit)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13871

HERMAN LIVERIGHT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 18, 1960

MR. HARRY I. RAND for appellant.

MR. WILLIAM HITZ, Assistant United States Attorney, with whom MESSRS. OLIVER GASCH, United States Attorney, CARL W. BELCHER, LEWIS CARROLL, and HAROLD D. RHYNEDANCE, JR., Assistant United States Attorneys, were on the brief for appellee. MR. JOHN D. LANE, Assistant United States Attorney, also entered an appearance for appellee.

Before:

WASHINGTON, BASTIAN and BURGER,
Circuit Judges.

BURGER, *Circuit Judge*:

Appellant was convicted after jury trial on 14 counts of a 15 count indictment for refusing to answer pertinent questions before the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate.* The questions were asked during the course of an executive session and later at a public hearing before the Subcommittee.[1] Appellant was sentenced to three months impris-

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* The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13464. Gojack v. United States, decided this day.

[1] Indictment questions were as follows:

Count 1: "Are you now an active Communist?"
Count 2: "Have you been membership director of the Thomson-Hill branch of the Communist Party in 1943?"
Count 3: "Are you now a Communist?"
Count 4: "Have you ever been a member of the Communist Party?"
Count 5: "Were you sent on a mission for the Communist Party into the South?"
Count 6: "Have you affiliated with a Communist cell in the city of New Orleans, composed of professional people?"
Count 7: "Were there Communist meetings in your home at 333 Ware Street, in New Orleans?"
Count 8: "State whether or not you were at one time membership director of the Thomson-Hill branch of the Communist Party?"
Count 9: "We have information, sir, and we desire to know how this conspiracy is financed, that you have given money to the Communist Party on various occasions. State whether that is true or untrue."
Count 10. "In 1952, did you and your wife rent a post-office box in White Plains, New York?"

onment and a fine of $500. Conviction on any one of these counts would sustain such a sentence.

The hearings at which appellant appeared were part of a Senate investigation which had been in progress for 5 years or more under the authority of Senate Resolution 366, 81st Congress, 2d Sess. (1950),[2] concerning the operation and enforcement of the Internal Security Act of 1950, of laws relating to espionage and sabotage and the extent, nature and effects of subversive activities and infiltration

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Count 11. "Did you attempt to rent a post-office box in White Plains, N. Y., under the name of the Westchester County Committee for Ethel and Julius Rosenberg?"

Count 12: "Is it not a fact that you sent those children away from home, from your home, in order to have a meeting in your home of a Communist cell, and you did not want your children to see the people in the city of New Orleans, who belonged to this cell?"

Count 13: "When did you join the Communist Party, Mr. Liveright?"

Count 14: "Did word come to you from the Communist leadership in New York after you affiliated, to stay clean in New Orleans?"

Count 15: "Mr. Liveright, is your wife a member of the Communist Party?"

The indictment was laid under 2 U. S. C. § 192 (1958).

[2] Senate Resolution 366 reads in part:

"*Resolved*, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

by foreign controlled persons into various areas of American life.

The volunteered testimony of Winston M. Burdett, a prominent foreign correspondent and radio and TV newscaster, who appeared before the Subcommittee in 1955, had disclosed to the Subcommittee a widespread effort of the Communist Party to place persons under its discipline in positions of key importance in newsgathering and news dissemination media, including radio, television and newspapers. Burdett, before renouncing Communism and the Communist Party had served, among other capacities, as a courier for the Communist apparatus. Burdett gave the Subcommittee names and details of Communist Party infiltration, activities and techniques. Burdett did not give information about appellant.

When appellant appeared before the Subcommittee, he was represented by counsel shown by the record to be familiar with such work before the Internal Security Subcommittee. Prior to the hearing, appellant's counsel had conferred with counsel for the Subcommittee. Appellant was first questioned briefly in executive session where he refused to answer questions as to Communist Party membership and activities. He submitted a lengthy statement of the alleged legal and constitutional basis for his refusal to answer questions.[3]

The public hearing was held the same day appellant refused to answer questions in executive session. Almost

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[3] The statement is similar in substance to one given the Subcommittee by another witness, William A. Price, who appeared in hearings represented by Philip Wittenberg, the lawyer who appeared with appellant. Among other things the objection stated: "The Congress of the United States has no constitutional right to legislate with regard to prior restraint on utterance; no ex post facto law can be passed determining innocence or criminality, and therefore any investigations into my speech or communications is beyond the power of this committee . . . ." S. Rep. No. 1766, 84th Cong., 2d Sess., p. 20 (1956).

without exception the indictment count questions were followed by consultation by appellant with counsel and as to all of them the written statement of objections was expressly made the basis for refusal to answer.[4]

While appellant always relied on his formal statement of objections he occasionally paraphrased the objection in exchanges with the Chairman or counsel. Typical is the following:

> "I respectfully object to the power and jurisdiction of this subcommittee to inquire into my political beliefs, into any other personal and private affairs, and into my associational activities.
>
> I am a private citizen engaged in work in the field of communication.
>
> The grounds of my objection are as follows:
>
> Any investigation into my political beliefs, any other personal and private affairs, and my associational activities, is an inquiry into personal and private affairs which is beyond the powers of this sub-committee. I rely not upon my own opinion but upon statements contained in the opinions of the Supreme Court of the United States.
>
> Among others, in United States against Rumely, 345 United States —." S. Rep. No. 1766, 84th Cong., 2d Sess. at p. 10 (1956).

---

[4] Appellant's reliance on his counsel is further indicated by the colloquy at the close of his appearance:

"Chairman Eastland: Is there anything else?

"Mr. Morris: Not of this witness, Senator.

"Chairman Eastland: That will be all.

"Mr. Liveright: Thank you, sir.

"Chairman Eastland: Mr. Wittenberg, in the event that we may have to have Mr. Liveright testify again, may we do so by calling you instead of subpoenaing him?

"Mr. Wittenberg: Yes, if you will give me enough time and remember that he is down in New Orleans.

"Mr. Morris: Oh, we understand that. You will supply him rather than have us subpoena him again?

"Mr. Wittenberg: Oh, surely." *Id.* at 17-18.

Appellant challenges his conviction on multiple grounds:

1. The charter of the Subcommittee is not based on a legislative purpose which justifies impairment of First Amendment rights.
2. The subject matter of the hearings was not made known to appellant.
3. The pertinency of the questions to any disclosed legislative purpose was not revealed to appellant with the required clarity.
4. The Subcommittee could not invade appellant's First Amendment rights to secure information which it already had in its possession.
5. The Subcommittee had no basis to subpoena appellant and it was reversible error to refuse to permit production of Senate records which contained the information relied on in calling appellant as a witness and error to deny appellant's demand to cross-examine as to the sources of the Senate's information.
6. The Subcommittee was not lawfully constituted and even if it was it could not lawfully meet while the Senate was in session without special consent of the Senate, under 2 U. S. C. § 190b(b) (1958).
7. The issue of pertinency of the questions should have been submitted to the jury.

Other assigned errors have been carefully considered but do not warrant discussion.

(1) As to appellant's first contention we hold that the charter of the Subcommittee rests on a broad but specifically described legislative purpose, namely the operation of internal security laws which Congress considered in need of constant legislative surveillance due to constantly changing Communist Party techniques as well as infirmities in the statutes. Specifically such witnesses as Burdett had made Congress aware of the Communist

Party strategy of placing its disciples in key positions in the fields of communications, newsgathering and reporting, education and other areas in which public opinion could be influenced. This subject was within the Subcommittee's power to investigate. The responsibility and power of the Congress to pursue such inquiries is not open to doubt. Any possible interference with First Amendment rights is outweighed by the vital national interests at stake in the subject of the inquiry. See *Barenblatt* v. *United States*, 360 U. S. 109 (1959); *Shelton* v. *United States*, No. 13737 (D. C. Cir., June 18, 1960).

(2) As to the second contention that the subject was not made known to appellant, the record shows appellant's counsel conferred with Subcommittee counsel and both appellant and his counsel exhibited awareness of the subject of inquiry. At the opening of the public hearing Subcommittee counsel made a statement[5] as to the subject

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[5] "Mr. Chairman, before commencing the interrogation of this partciular witness this afternoon, I would like to restate again for the record the purpose of the particular series of hearings being held by the Internal Security Subcommittee. I read now from the opening statement of the chairman:

'We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures.

* * *

'We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and the composition of our own Government here, as the facts bearing on these issues are gathered in the public record of this subcommittee which will enable it to make recommendations or determinations as to whether the Internal Security Act of 1950 and other existing law should be repealed, amended or revised, or new laws enacted.'

"This witness is being called here this afternoon, Senator, in the course of that particular set or series of hearings." S. Rep. No. 1766, 84th Cong., 2d Sess., pp. 6-7 (1956).

and purpose of the hearing and from time to time counsel or the Chairman added additional information by way of explanations[6] of pertinency in an effort to persuade appellant to answer.

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[6] "Mr. Morris: Mr. Chairman, this committee has been informed that Mr. Liveright and his wife were active in the Communist Party of New York City, and that at the time and date they moved to the South, they were formally asked by their Communist Party superiors to keep away from formal associations with the Communist Party at that time in their activities." *Id.* at 12.

* * *

"Chairman Eastland: The question [Have you ever been a member of the Communist Party?], Mr. Liveright, is very pertinent. We are attempting to see what amendments are needed to the Internal Security Act. In addition, and as a part of that, *we are tracing the activities of the Communist Party in this United States.*

"Our information is, sir, *that you were sent South and placed there with your wife on a mission for the Communist Party,* and were told by your superiors not to become involved with a Communist cell that was a professional group in the city of New Orleans, *but the word was used by your superiors to stay clean.*

"Now, is that true? Were you sent on a mission for the *Communist Party into the South?*" (Emphasis added.) *Id.* at 13.

* * *

"Chairman Eastland: Mr. Liveright, the Communist movement, with which we have information that you are affiliated, sir, is a conspiracy against your coutry. . . . *We have information, sir, and we desire to know how this conspiracy is financed, that you have given money to the Communist Party on various occasions. State whether that is true or untrue.*" (Emphasis added.) *Id.* at 15.

* * *

"Chairman Eastland: It seems that if you had not participated in this conspiracy and if you had not helped finance it, that you would be very glad to answer that question, Mr. Liveright." *Ibid.*

* * *

"Chairman Eastland: You have the opportunity now to help your country by just frankly answering the questions and telling us the truth, to enable us to— * * * draft legislation to protect the welfare and the safety of our country. And it appears that you would be most anxious, Mr. Liveright, to do that. Most Americans would." *Ibid.*

The questions in context, appellant's responses to them, his statement of "objections" and the record as a whole disclose plainly and beyond dispute the subject of the investigation to be Communist Party tactics, infiltration and penetration into geographical areas and into particular professional groups including communications media. Assuming, arguendo, that the subject covered by the Senate Resolution was, in this case, not sufficiently specific and concrete to inform appellant of the subject under inquiry, the opening statement to him carefully pointed out at least one narrow and specific area or subject of inquiry. That limited area was defined as "the structural revisions that the Communists have made in their network in order to avoid detection, and * * * to trace the movement of individual agents through these changing structures."[7] This was pinpointed by telling him what had been reported to the Subcommittee about his "mission South" and the questions[8] related directly to this subject. See footnote 6, *supra*.

(3) The pertinency of the specific questions to this plainly revealed subject of inquiry is obvious from the questions themselves and from appellant's formal objections and his comments. Additionally the Chairman and his counsel explicitly spelled out their pertinency in their effort to persuade appellant to cooperate. See footnote 6, *supra*.

(4) The fact that the Subcommittee may have had every item of information concerning which appellant was interrogated does not reduce its right or power to seek confirmation directly from him. Moreover, appellant was entitled to an opportunity to refute or explain the information and reports about him before those activities possibly became the subject of any public reports the

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[7] S. Rep. No. 1766, 84th Cong., 2d Sess., p. 6 (1956).

[8] See Indictment Counts 3, 5, 6, 7, 9, 12, 14, footnote 1, *supra*.

Subcommittee might make. Nor is it a bar to interrogation at a public hearing that appellant was asked and refused to answer some or even all of the same questions in executive sessions. *Cf. Young* v. *United States*, 94 U. S. App. D. C. 54, 212 F. 2d 236, *cert. denied*, 347 U. S. 1015 (1954).

(5) The argument that appellant is entitled to see and cross-examine concerning the information which led the Subcommittee to issue a subpoena for him is without any merit on this record. It is plain here, as in *Barenblatt*, that the Subcommittee did not call appellant as part of a "broadside" or "dragnet" process. From various confidential sources, which Committee counsel testified they had found reliable in the past, there were strong indications[9] that appellant may have engaged in Communist Party activities of the particular kind which the counsel stated were under special scrutiny, *i.e.*, "structural revisions • • • in their network in order to avoid detection." If the information received by the Subcommittee concerning appellant's activities was true, his actions were not of a character protected by the First Amendment.

(6) Whether a Senate Subcommittee meets for inquiry purposes while the Senate is in session without prior consent of the Senate is not a matter available to appellant as a defense to his actions. Any infirmity in the conduct of the hearings in this respect was cured by the Senate action in citing appellant for contempt.[10]

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[9] Indeed item 1—the signing of Communist Party nominating petitions—was presumably available on the public record and appellant does not challenge that he did so sign, giving some indication that the other reports on appellant might be true.

[10] Moreover, Senate Resolution 366, the basic enabling Resolution 366, the basic enabling Resolution, specifically authorizes the subcommittee "to sit and act at such places and times *during* the sessions, recesses, and adjourned periods of the Senate, . . . as it deems advisable."

(7) The pertinency of the questions to the subject matter is not for the jury but for the court and as we have indicated, the Court decided the issue correctly. *Sinclair* v. *United States*, 279 U. S. 263 (1929); *Keeney* v. *United States*, 94 U. S. App. D. C. 366, 218 F. 2d 843 (1954). The suggestion that there was a design to multiply the offenses by purchasing a line of questioning which appellant showed he would not answer is without merit. The courts will not permit a contumacious witness to bootstrap himself into immunity by his own recalcitrance.

As we have pointed out, the sentence imposed by the District Court on appellant would be sustainable even though appellant had been convicted on any one count of the indictment.

Affirmed.

Appendix B

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 13,871
September Term, 1959
Criminal 1212-56

HERMAN LIVERIGHT,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

United States Court of Appeals
for the
District of Columbia
Circuit
Filed Jun 18 1960
Joseph W. Stewart
Clerk.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

WASHINGTON, BASTIAN and BURGER,
Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge BURGER.

Dated: Jun 18, 1960

Appendix C

(Statutory Provisions Involved)

2 U. S. C. 192 (R. S. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) reads, as follows:

> "Refusal of witness to testify
>
> "Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

2 U. S. C. 190a (Legislative Reorganization Act of 1946, August 2, 1946, c. 753, Title I, § 133, 60 Stat. 831) reads, in pertinent part, as follows:

> "Committee meetings, hearings, records and reports
>
> • • •
>
> "(f) All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session."

2 U. S. C. 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753 Title I, § 134 (a), (c), 60 Stat. 831, 832) reads, in pertinent part, as follows

> "Authority of Senate standing committees and subcommittees; sitting while Senate or House in session
>
> • • •

"(b) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

(Senate Resolution Involved)

Senate Resolution 366, 81st Cong. 2d Sess., reads as follows:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"RESOLVED, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal

security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

No. 626

In the Supreme Court of the United States

OCTOBER TERM, 1960

HERMAN LIVERIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
J. WALTER YEAGLEY,
Assistant Attorney General,
GEORGE B. SEARLS,
JACK D. SAMUELS,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and resolution involved	2
Statement	3
Argument	9
Conclusion	22

CITATIONS

Cases:

Barenblatt v. *United States*, 240 F. 2d 875, reversed, 354 U.S. 930 18

Barenblatt v. *United States*, 360 U.S. 109 ..... 4, 10, 12, 13, 14, 17, 20, 21, 22

Braden v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 960 ..... 21, 22

Dennis v. *United States*, 339 U.S. 162 19

Deutch v. *United States*, No. 233, this Term 4

Emspak v. *United States*, 203 F. 2d 54, reversed, 349 U.S. 190 11

Finn v. *United States*, 256 F. 2d 304 18

Howenstine v. *United States*, 263 Fed. 1 18

Quinn v. *United States*, 349 U.S. 155 18

Russell v. *United States*, No. 239, this Term, pending on petition for a writ of certiorari 18, 19, 21

Sacher v. *United States*, 240 F. 2d 46, reversed, 354 U.S. 930 ..... 18, 20

Shelton v. *United States*, No. 246, this Term 20

Sinclair v. *United States*, 279 U.S. 263 21

United States v. *Bryan*, 339 U.S. 323 11

United States v. *Deutch*, 235 F. 2d 853 18

United States v. *Myers*, 18 F.R.D. 299 19

Watkins v. *United States*, 354 U.S. 178 17

Whitman v. *United States*, No. 300, this Term, pending on petition for a writ of certiorari 9

Wilkinson v. *United States*, No. 37, this Term, certiorari granted, 362 U.S. 926 21

Constitution and statutes:
United States Constitution: Page
First Amendment 2, 7, 12, 22
Fourth Amendment 20
Fifth Amendment 7
Legislative Reorganization Act of 1946, C. 753, Title I, Sections 133, 134, 60 Stat. 831–832 (2 U.S.C. 190a, 190b) 2–3, 11, 12
2 U.S.C. 192 ..... 2, 3
Miscellaneous:
S. Res. 366, 81st Cong., 2d Sess. 2, 3, 9, 10, 11–12, 16

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 328

HERMAN LIVERIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21–31) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (Pet. App. 32). On July 13, 1960, Mr. Justice Black extended the time to file petition for a writ of certiorari to and including August 17, 1960, and the petition was filed on August 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366, 81st Cong., 2d Sess., is sufficiently clear to authorize the Internal Security Subcommittee to ask the questions which petitioner refused to answer.

2. Whether the Subcommittee was legally authorized to hold the particular hearing at which petitioner was questioned.

3. Whether the First Amendment protected petitioner in refusing to answer the questions.

4. Whether, at the time petitioner appeared before it, the Subcommittee was engaged in investigating a subject matter which was sufficiently identified and of which petitioner was adequately apprised.

5. Whether the indictment was invalid because it did not specify the subject under inquiry or the pertinency of the questions to that subject, and did not allege that petitioner's refusal to answer was wilful.

6. Whether petitioner had the right to a hearing to determine whether the Federal Government employees on the grand and petit jury were biased or was entitled to have all Federal Government employees on the petit jury disqualified.

7. Whether the rulings of the trial court denied petitioner the right of cross-examination and a fair trial.

8. Whether the pertinency of the questions is a matter of law to be decided by the trial court.

STATUTES AND RESOLUTION INVOLVED

Relevant portions of 2 U.S.C. 192, as amended; the Legislative Reorganization Act of (August 2,)

1946, c. 753, Title I, Sections 133, 134, 60 Stat. 831–832 (2 U.S.C. 190a, 190b); and Senate Resolution 366, 81st Cong., 2d Sess., are set forth in Appendix C to the petition, pages 33–35. In addition, Section 2 of the Resolution states:

> The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpoenas or otherwise the attendance of such witnesses and the production of such books, papers and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and within the amount appropriated therefor, to make such expenditures as it deems advisable. * * *

STATEMENT

Petitioner was charged in a fifteen-count indictment in the District Court for the District of Columbia with having refused, in violation of 2 U.S.C. 192, to answer fifteen questions, pertinent to the matter under inquiry, put to him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 1–3). Upon a trial by jury, petitioner was found guilty on counts 1 through 14 (J.A. 134). Count 15 was dismissed (J.A. 126). Petitioner was sentenced by the district court to imprisonment for three months and to pay a fine of five hundred dollars (J.A. 12). The

judgment of the trial court was affirmed by the court of appeals.[1]

The pertinent facts may be summarized as follows:

In connection with its continuing investigation since 1951 into Communist subversion and the operation of the internal security laws (J.A. 89–90, 92), the Subcommittee, on June 28 and 29, 1955, heard Winston Burdett, a newspaperman and broadcaster, who had been a member of the Communist Party from 1937 until the early 1940's, testify concerning Communist infiltration of communications media (J.A. 87). He stated that, after he had become a Party member, Party leaders had induced him to become a foreign correspondent for a major American newspaper and to use that position as a cover for military espionage for the Soviet Union. Subsequently, the Subcommittee convened hearings to explore matters stemming from Mr. Burdett's testimony (J.A. 88).

Robert Morris, the chief counsel of the Subcommittee, testified that prior to calling petitioner the Subcommittee had information that he had been active in Communist activities in New York and subsequently had been transferred with orders to carry on Party activities in New Orleans. According to this information, petitioner moved to New Orleans for the

---

[1] The court of appeals delayed argument and determination of this case, along with seven other contempt-of-Congress cases, until after this Court's decision in *Barenblatt* v. *United States*, 360 U.S. 109. Petitions for certiorari have been filed in all six cases in which the convictions were affirmed. See the Government's Brief in Opposition in *Deutch* v. *United States*, No. 233, this Term, pp. 8–9.

purpose of becoming active in and ultimately taking over the direction of the professional branch, which was an underground operation of the Party. One of the addresses in New Orleans where petitioner resided was 333 Ware Street, and the Subcommittee had learned that secret Communist activities were held at that address (J.S. 75–81). After petitioner had gone to New Orleans, the Communist leadership cautioned petitioner to stay away from open Communist activities (J.A. 80–81). The Subcommittee knew that petitioner and his wife had rented a post office box in White Plains, New York, under the name of Westchester County Committee for Ethel and Julius Rosenberg, which was part of a fund-raising drive in behalf of two Communists who had been convicted and sentenced to death for violation of the Espionage Act. It was also known that this committee was raising money for Communist purposes in addition to the purpose of defense funds for the Rosenbergs (J.A. 79–81). The Subcommittee also had information that the petitioner had been a Party member shortly before he appeared before it (J.A. 77); that petitioner had subscribed to Communist Party nominating petitions (J.A. 75–76); that he had contributed money to the Communist Party (J.A. 79); and that he had been membership director of the Thomson-Hill Branch of the Party in 1943 (J.A. 76–77).

On the basis of this information, a subpoena was served on petitioner to appear before the Subcommittee on March 19, 1956. Prior to his appearance,

petitioner's counsel, Philip Wittenberg, a New York attorney with experience in the field of civil liberties (J.A. 81–82), telephoned the Subcommittee counsel, Mr. Morris, and asked about the scope of the inquiry. Mr. Wittenberg was informed in general terms by Mr. Morris as to the scope of the inquiry, without relating the specific evidence possessed by the Subcommittee (J.A. 67–71). Mr. Wittenberg, according to Mr. Morris, did not challenge the Subcommittee's authority, but "indicated that he knew the work of the Internal Security Subcommittee and what we were trying to do" (J.A. 69–70) and "then became specific when he said he knew what problems I would have on internal security" (J.A. 71).

Petitioner appeared with his counsel before the Subcommittee on March 19, 1956, first in executive session and then (following a recess) in a public session. At the executive session, petitioner initially disclosed his identity, occupation, and his address for the previous two years as 2239 General Taylor Street in New Orleans (J.A. 18). He denied, after consulting counsel, that Communists had been meeting at his home, but declined to state whether he was then an active Communist or whether he had been membership director at the Party's Thomson-Hill branch in 1943 (counts 1, 2) (J.A. 19–20). Petitioner refused to answer these questions on the basis of a lengthy legal memorandum, which he submitted to the Subcommittee (J.A. 41–50). Petitioner's main objection was that the Subcommittee was invading "my political beliefs, any other personal and private affairs, and my associ-

ational activities" protected by the First Amendment (J.A. 41–42). His remaining objectives were based on the separation of powers and the bill of attainder clause of the Constitution (J.A. 46–50). Petitioner expressly disclaimed any reliance on the Fifth Amendment (J.A. 20).

After petitioner's refusal to answer the two questions, he was temporarily excused (J.A. 21). The Subcommittee then decided to take further testimony from petitioner in a public session, since it was hoped that this might lead petitioner to change his mind (J.A. 105–106). About an hour and fifteen minutes later, petitioner, with his counsel, was called before the Subcommittee in public session. He was then advised by Mr. Morris (J.A. 21–22):

> Mr. Chairman, before commencing the interrogation of this particular witness, I would like to restate again for the record the purpose of the particular series of hearings being held by the Internal Security Subcommittee. I read now from the opening statement of the chairman:
>
> "We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures."
>
> "Under consideration during these hearings will be the activities of Soviet agents and agen-

cies registered with the Department of Justice and such other agents or agencies not now registered whose activities may warrant legislative action."

"We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and composition of our own Government here, as the facts bearing on these issues are gathered in the public record of this subcommittee which will enable it to make recommendations or determinations as to whether the Internal Security Act of 1950 and other existing law should be repealed, amended or revised, or new laws enacted."

This witness is being called here this afternoon, Senator, in the course of that particular set or series of hearings.

Petitioner described his duties as television program director for a television station in New Orleans, as well as his previous employment in New York City and elsewhere (J.A. 22–32). The Subcommittee counsel, Mr. Morris, then stated (J.A. 32):

Mr. Chairman, this committee has been informed that Mr. Liveright and his wife were active in the Communist Party of New York City, and that at the time and date they moved to the South, they were formally asked by their Communist Party superiors to keep away from formal associations with the Communist Party at that time in their activities.

* * * * *

The purpose of subpoenaing this witness and asking him the following questions is to deter-

> mine to what extent Mr. Liveright's activities have been carried out in New Orleans in the framework of the Communist Party and to what extent they have been carried out in some other framework.

Petitioner refused, even after being ordered by the Chairman, to answer whether he was then or had ever been a Communist (counts 3, 4) (J.A. 32–33). His refusals were based on the written memorandum previously submitted to the Subcommittee. Petitioner also refused to answer a series of other questions on the basis of this same memorandum (counts 5–14) (J.A. 33–40).

ARGUMENT

1. Petitioner contends (Pet. 7–9) that "the grant of authority to the [Subcommittee] is so vague as to invalidate the Subcommittee's power to compel testimony in the First Amendment area." This contention is without substance.

In our Brief in Opposition (pp. 9–12) in *Whitman* v. *United States*, No. 300, this Term, pending on petition for a writ of certiorari, we have shown that Senate Resolution 366, 81st Cong., 2d Sess., is sufficiently clear—particularly when considered with its legislative gloss—to authorize the Internal Security Subcommittee to investigate Communist infiltration of the press. Similarly, this investigation of Communist activity in the United States as a whole was authorized. Before petitioner's testimony at the public session, Subcommittee counsel read the opening statement of the Chairman stating that the purpose of the hearing was to determine (1) "whether the Inter-

nal Security Act of 1950 and [(2)] other existing law should be repealed, amended or revised, or new laws enacted" and (3) "to what extent Soviet power operates through the Communist Party here" and "to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad" (see the Statement, *supra*, pp. 7–8). These three topics correspond almost precisely to the three subjects the Subcommittee is authorized by S. Res. 366 to investigate: (1) the administration, operation and enforcement of the Internal Security Act and (2) of other laws relating to internal security; and (3) "the extent, nature, and effects of subversive activities in the United States * * * including * * * infiltration by persons who are or may be under the domination of the foreign government or organization controlling the world Communist movement * * *" (see Pet. App. 34–35). And even if the resolution were not itself clear, the legislative gloss placed on the resolution before petitioner appeared—the holding of repeated hearings by the Subcommittee on this subject, the report of these hearings to Congress, and the repeated appropriation of money to the Subcommittee by Congress based on these reports—shows that the hearing involved here was well within the scope and meaning of the resolution. See *Barenblatt* v. *United States*, 360 U.S. 109, 117–120. As this Court held in *Barenblatt* with regard to the House Committee on Un-American Activities, "In light of this long and illuminating history it can hardly be seriously argued that the investigation of Communist activities gener-

ally, and the attendant use of compulsory process, was beyond the purview of the Committee's intended authority * * *." 360 U.S. at 121.

2. Petitioner asserts (Pet. 16–17) that the Subcommittee, when petitioner appeared before it, was not a competent tribunal because the Legislative Reorganization Act of 1946 (see Pet. 33–34) provides (1) that "[n]o standing committee of the Senate * * * shall sit, without special leave, while the Senate * * * is in session" and (2) that all hearings conducted by Senate committees "shall be open to the public, except executive sessions for marking up bills, or for voting or where the committee by a majority vote orders an executive session." But neither of these contentions is available to petitioner since he made no objection to the constitution of the Subcommittee at the time he was called before it. *United States* v. *Bryan*, 339 U.S. 323, 330–335; *Emspak* v. *United States*, 203 F. 2d 54 (C.A. D.C.), reversed on other grounds, 349 U.S. 190. If petitioner had made at that time the objections he subsequently raised at his trial, the Subcommittee could easily have satisfied them. "To deny the Committee the opportunity to consider the objection or remedy is in itself a contempt of its authority and an obstruction of its processes." *United States* v. *Bryan*, *supra*, 339 U.S. at 333.

In any event, petitioner's contentions are without merit. Section 2 of S. Res. 366, 81st Cong., 2d Sess. (*supra*, p. 3), passed in 1950, expressly provides that the Committee on the Judiciary, "or any duly authorized subcommittee thereof, is authorized to sit and act

at such places and times during the sessions * * * of the Senate * * * as it deems advisable."'[3] And while it appears that the executive session was not authorized by majority vote (J.A. 96), only counts 1 and 2 arose from questions asked during this session. Since counts 3 through 14 arose from questions asked at the public session, and since petitioner was given a general sentence which was less than he could have received on each count, his conviction must be affirmed if any count is valid. *Barenblatt* v. *United States*, *supra*, 360 U.S. at 126, fn. 25.

3. Petitioner argues (Pet. 2, 13–15, 17–18) that his rights under the First Amendment were violated because the Subcommittee was investigating Communist infiltration of communications, newspapers, and education, the government did not show probable cause for compelling petitioner to testify, and the government failed to show why petitioner's right of privacy must be subordinated to governmental interests. Application, however, of the rulings of this Court in *Barenblatt* to the facts of this case demonstrates that petitioner's claims cannot be sustained.

First, *Barenblatt* decided that congressional committees can investigate Communist infiltration of education, an area likewise protected by the First Amendment. It therefore follows that the Subcommittee's

[3] In addition, it seems doubtful that the provision of the Legislative Reorganization Act, unlike a requirement that a quorum be present, was intended to protect the rights of a witness. Rather, the purpose of the provision was apparently to assist Congress in securing the attendance of members at legislative sessions.

investigation of the Communist infiltration of communications is not constitutionally prohibited. Second, the Court suggested in *Barenblatt* that congressional committees cannot engage in "indiscriminate dragnet procedures, lacking in probable cause for belief that [the witness] possessed information which might be helpful to the Subcommittee." 360 U.S. at 134. But the evidence in this case shows that, before petitioner was subpoenaed, the Subcommittee had considerable information as to petitioner's active participation in Party activities and some of this information was conveyed to petitioner during his appearance before the Subcommittee (see the Statement, *supra*, pp. 4–5, 8). Certainly, the Subcommittee had probable cause to believe that petitioner could contribute substantially to the investigation. And, lastly, the Subcommittee's knowledge (see the Statement, *supra*, p. 4) of serious Communist infiltration of communications media, coupled with its probable cause for belief that petitioner possessed information on this subject, clearly justifies the same conclusion this Court found in *Barenblatt*—that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended." 360 U.S. at 134.

4. Petitioner argues (Pet. 9–13) that the Subcommittee was not, at the time he appeared before it, engaged in a subject under inquiry which was sufficiently identified and of which he was adequately apprised.

a. Petitioner, however, failed to object to the questions asked on the grounds of pertinency when he appeared before the Subcommittee. Rather, his lengthy statement of legal argument and authorities (J.A. 41–50), which was obviously prepared by or at least with the help of petitioner's counsel, justifies his refusal to answer entirely on the basis of various constitutional grounds (see the Statement, *supra*, pp. 6–7). The only suggestion of an objection to pertinency is the statement that petitioner "might wish to * * * challenge the pertinency of the question to the investigation" (J.A. 48). Considering the same statement in a substantially similar legal memorandum,[3] this Court, in *Barenblatt*, 360 U.S. at 124, held that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, and buried as they were in the context of [the witness'] general challenge to the power of the Subcommittee * * *." Therefore, here, as in *Barenblatt*, the witness failed "to trigger what would have been the Subcommittee's reciprocal obligation" to explain the pertinency of the questions, and the witness is foreclosed from raising the issue for the first time in the contempt proceeding. *Ibid.*

b. On the record in this case no reasonable man in petitioner's situation—and certainly not one as articulate and intelligent as petitioner, who was represented by experienced counsel—could have had any

[3] See page 234 of the Record in *Barenblatt* v. *United States*, No. 35, Oct. Term, 1958.

real doubt as to the "topic under inquiry." Before he appeared, the counsel who represented him at the hearing had telephoned counsel for the Subcommittee and was informed in general terms as to the subject matter of the inquiry; and petitioner's counsel had indicated that he understood.[4] At the brief executive session on March 19, 1956, petitioner himself presented a written statement of objections which revealed that he understood that the Subcommittee was going to inquire about his "political beliefs" and his "associational activities" (J.A. 41–42).

Any doubt in petitioner's mind concerning the subject under inquiry was surely cleared up when the Subcommittee counsel read to petitioner the opening statement of the Chairman at the public session in regard to "the purpose of the particular series of hearings" (J.A. 21). Included in the statement were these specific remarks (J.A. 22):

> We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movements of individual agents through these changing structures.
>
> * * * * *

---

[4] In the conversation, petitioner's counsel "indicated that he knew the work of the Internal Security Subcommittee and what we were trying to do" (J.A. 70; see the Statement, *supra*, p. 6).

> We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and the composition of our own Government here [in order to enable the Subcommittee to make recommendations] whether the Internal Security Act of 1950 * * * should be repealed, amended or revised, or new laws enacted."[8]

Subcommittee counsel then told petitioner that the Subcommittee's purpose in questioning him "is to determine to what extent [his] activities have been carried out in New Orleans in the framework of the Communist Party" (J.A. 32). When petitioner refused to answer whether he was then or had ever been a Communist, (counts 3 and 4), the Chairman explained (J.A. 33):

> The question, Mr. Liveright, is very pertinent. We are attempting to see what amendments are needed to the Internal Security Act. In addition, and as a part of that, we are tracing the activities of the Communist Party in the United States.
>
> Our information is, sir, that you were sent South and placed there with your wife on a mission for the Communist Party, and were told by

[8] As we have shown (pp. 9–10), this statement, in effect, says that the subject under inquiry is the full extent of the Subcommittee's authority under Senate Resolution 366. The statements of the Subcommittee counsel and the Assistant United States attorney at petitioner's trial which petitioner quotes (Pet. 11) are to the same effect.

> your superiors not to become involved with a Communist cell that was a professional group in the city of New Orleans, but the word was used by your superiors to stay clean.

Similarly, after the Chairman stated that the Committee was desirous to know "how this conspiracy is financed," petitioner was asked and he refused to answer whether he had given money to the Communist Party (count 9) (J.A. 36). In sum, it is difficult to see how the "topic under inquiry" and the relevance to that topic of the questions asked could have been made much clearer.

Petitioner suggests (Pet. 10–11) that the subject under inquiry stated by the Chairman was too broad. But neither *Barenblatt* nor *Watkins* v. *United States*, 354 U.S. 178, suggests that congressional committees must divide their investigations into various topics, each to be investigated at a separate hearing. Such a requirement would seriously interfere with the work of the committees, particularly when, as here, a committee is attempting to follow up the extensive testimony of an earlier witness (see J.A. 88). In such instances, it may be very difficult for the committee to designate a particular hearing as, for example, Communist infiltration of the radio or of the press.

5. Petitioner contends (Pet. 18–19) that the indictment was invalid because (a) it failed to specify the subject under inquiry or the pertinency of the questions and (b) did not allege that petitioner's refusal to answer was wilful.

a. The indictment stated simply, in the words of the statute, that the defendant unlawfully refused to answer "questions which were pertinent to the question then under inquiry" (J.A. 1). As we have shown in our Brief in Opposition (pp. 8–10) in *Russell* v. *United States*, No. 239, this Term, pending on petition for a writ of certiorari, this form of indictment—simply charging the defendant in the statutory language—is supported by substantial judicial authority. Moreover, petitioner was not compelled by the general obligation of the indictment to guess as to the subject under inquiry or the pertinency of the questions since this was fully explained to petitioner when he appeared before the Subcommittee (*supra*, pp. 15–17). And if he was left in any doubt, he could have easily moved for a bill of particulars.

b. Petitioner's contention that the indictment must allege wilfulness has been repeatedly rejected. *United States* v. *Deutch*, 235 F. 2d 853 (C.A.D.C.); *Sacher* v. *United States*, 240 F. 2d 46, 53 (C.A.D.C.); *Barenblatt* v. *United States*, 240 F. 2d 875, 878 (C.A. D.C.), reversed on other grounds, 354 U.S. 930. While it is true that, where wilfulness is an element of the crime, that requirement cannot be ignored in the indictment, it is also true that the charge may include either that term or words of similar import. The allegation here that petitioner "unlawfully" refused to answer (J.A. 1) is sufficient to allege that the refusal was a "deliberate, intentional" one. *Quinn* v. *United States*, 349 U.S. 155, 165; see *Howenstine* v. *United States*, 263 Fed. 1, 4 (C.A. 9); *Finn* v. *United*

States, 256 F. 2d 304, 306 (C.A. 4); *United States* v. *Meyers*, 18 F.R.D. 299, 300 (E.D. N.Y.).

6. Petitioner further contends (Pet. 19) that he was denied the opportunity to show the bias of Federal Government employee jurors so as to have the indictment dismissed and to have such jurors on the petit jury excused. But as we have shown in our Brief in Opposition (pp. 5–8) in *Russell* v. *United States*, No. 239, this Term, a defendant is not entitled to a hearing with respect to grand jurors unless, at the least, his motion and accompanying affidavit allege specific, individual, and strong bias in particular grand jurors—allegations which he would ultimately have to prove to have the indictment dismissed. Petitioner, however, has alleged only opinions that there exists among government employees *in general* fear of loss of employment as security risks so as to make it likely that any individual government employee would be afraid to vote against the return of an indictment in any case connected with Communism.

As to the petit jurors, petitioner of course had an opportunity on *voir dire* to show specific bias on the part of particular government employees. His motion, however, which was denied (J.A. 10), asked for the disqualification of all employees. But this Court has held in *Dennis* v. *United States*, 339 U.S. 162, 168, 172, a case involving the most important leader of the Communist Party, that specific demonstration of bias and fear—not mere claims that the security program intimidated many government employees—was necessary to disqualify even a petit juror for cause.

7. Petitioner attacks (Pet. 13–15) the trial court's order quashing subpoenas directed at the Subcommittee's files and sustaining objections to his cross-examination of the Subcommittee's counsel as to the identity of a confidential informant and information in the Subcommittee's files (J.A. 8–9, 10, 50–53, 97–98, 100, 117). Petitioner reasons that these actions prevented him from showing that the Subcommittee did not have probable cause to call him before it (see *supra*, p. 13).

When the Court in *Barenblatt* referred to "dragnet procedures" and "probable cause," it did not suggest that the sufficiency of the information or reasons which cause a committee to call a witness should be subject to plenary judicial review.[6] Rather, we believe, the Court intended at most to require only that congressional committees present evidence showing the basis of their decision to subpoena the witness. See *Sacher* v. *United States*, 240 F. 2d 46, 50 (C.A.D.C), reversed on other grounds, 354 U.S. 930. Here the Subcommittee's counsel testified on both direct and cross-examination concerning the information possessed by the Subcommittee as to petitioner's Communist activities (J.A. 75–81, 97–100) and refused to disclose only the files of the Subcommittee and highly confidential information (J.A. 50–53, 97–

[6] Significantly, the language of the Fourth Amendment and the decisions of this Court suggest that the scope of the Amendment does not extend to subpoenas to testify, as contrasted to subpoenas *duces tecum*. See the Government's Brief in Opposition (pp. 10–11) in *Shelton* v. *United States*, No. 946, this Term.

100, 117). The evidence offered by the Subcommittee's counsel should be sufficient since the decision whether a witness is to be called must be mainly for the legislative body to make. To superimpose on a trial for contempt a full-scale trial of a committee's judgment would be an invasion of the prerogative of the legislature and a serious interference with Congressional investigations.[7] The permissible scope of a congressional investigation, which of necessity must proceed step by step, is not to be limited by the strict requirements of a criminal prosecution. *Barenblatt* v. *United States, supra,* 360 U.S. at 130–133.

8. Petitioner also argues (Pet. 16) that the trial court erred in determining the pertinency of the questions as a matter of law. This contention is without merit. See *Sinclair* v. *United States,* 279 U.S. 263, and the Government's Brief in Opposition (pp. 12–13) in *Russell* v. *United States,* No. 239, this Term. Moreover, the questions petitioner refused to answer (J.A. 2–3) on which he was convicted all involved his own Communist activity and were clearly pertinent to the subject under inquiry.[8]

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[7] On petitioner's argument, a committee could only enforce its directions to witnesses at the cost of revealing at the trial all the information it had, including the identity of confidential informants.

[8] Petitioner suggests (Pet. 19) that certiorari should be granted because several of the issues raised by his petition are now before the Court in *Wilkinson* v. *United States,* No. 37, this Term, certiorari granted, 362 U.S. 926, and *Braden* v. *United States,* No. 54, this Term, certiorari granted, 362 U.S. 960. Although several of the issues are in fact common to this case and the two pending cases, we submit that the earlier cases do not provide any basis for asking this Court to grant

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

GEORGE B. SEARLS,
JACK D. SAMUELS,
Attorneys.

SEPTEMBER 1960.

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the writ or even to withhold action. Two of the issues raised by petitioner—whether the indictment must specify the subject under inquiry and whether the question of pertinency should be decided by the jury—are also involved in *Braden*. But while we cannot, of course, be certain of the reasons why the Court granted certiorari in that case, we believe that these issues are without substance, being controlled by clear judicial precedent, and are distinctly subsidiary to the more serious issues involved in *Braden*. While the two pending cases raise the pertinency of the questions to the subject under inquiry (which is closely related to the question in this case whether the witness was apprised of the subject under inquiry) and alleged violations of the witness' First Amendment rights, determination of these issues, in view of this Court's holding in *Barenblatt* (see 360 U.S. at 123–124, 127–134), depends on the particular facts of each case.

IN THE

Supreme Court of the United States

October Term, 1961

No. 11

HERMAN LIVERIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

HARRY I. RAND,
1501 Broadway,
New York 36, N. Y.

LEONARD B. BOUDIN,
25 Broad Street,
New York 4, N. Y.
Attorneys for Petitioner.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statement of the Case	3
Summary of Argument	10
I. The indictment was insufficient because it failed to set forth essential elements of the crime: subject matter of inquiry, pertinency, willfulness and subcommittee authority	16
II. The Government at the trial failed to show the subject of the Subcommittee's inquiry and to establish the pertinency of the indictment questions. Furthermore, these matters were not made "luminous" to the petitioner at the time of the Subcommittee hearing	16
III. Petitioner was unduly restricted in his right of cross-examination and right to make a full defense with respect to the issue of probable cause	31
IV. The charter of the Internal Security Subcommittee is unconstitutionally vague, thereby impairing petitioner's First and Fifth Amendment Freedoms	34
V. The Subcommittee's inquiry was in violation of petitioner's rights under the First Amendment	35
VI. The tribunal before which petitioner allegedly committed the contempts charged was not a competent committee of Congress	35

PAGE

A. Senator Eastland was not competent to sit as a committee of Congress by reason of failure to comply with Section 134(c) of The Legislative Reorganization Act of 1946 36

B. Senator Eastland was not competent to sit as a committee of Congress in executive session by reason of failure to comply with Section 133(f) of The Legislative Reorganization Act of 1946 40

VII. The indictment was invalid because a majority of the grand jurors were Federal Government employees 42

VIII. The issue as to pertinency should have been submitted to the jury 47

Conclusion 48

Appendix 49

Cases

Alford v. United States, 282 U. S. 687 31

Barenblatt v. United States, 252 F. 2d 129, 136, aff'd 360 U. S. 109 .....24, 26, 27, 28, 29, 30, 31, 32, 34

Braden v. United States, 365 U. S. 431 .....15, 26, 48

Brotherhood of Carpenters v. United States, 330 U. S. 395 47

Cammer v. United States, 350 U. S. 399 43

Cassell v. Texas, 339 U. S. 282 42

Christoffel v. United States, 338 U. S. 84 ...35, 38, 39, 43, 47

Costello v. United States, 350 U. S. 359 ..... 42, 43

Dennis v. United States, 339 U. S. 162 .....15, 43, 44, 45

Deutch v. United States, 367 U. S. 456 ....17, 22, 24, 28, 31

PAGE

Frazier v. United States, 335 U. S. 497 .....15, 43, 44, 45
Fried, In re, 161 F. 2d 453 (C. A. 2) 43

Hodges v. Easton, 106 U. S. 408 47

Jencks v. United States, 353 U. S. 657 33

McPhaul v. United States, 364 U. S. 372 27
Milligan ex parte, 4 Wall. (71 U. S.) 2 47

Pierre v. Louisiana, 306 U. S. 354 42
Price v. United States, No. 12, This Term 10, 13, 16, 34

Reilly v. Pinkus, 338 U. S. 269 31
Roviaro v. United States, 353 U. S. 53 33

Sacher v. United States, 356 U. S. 576 ..... 27, 29
Shelton v. United States, No. 9, This Term ...13, 26, 32, 35
Sinclair v. United States, 279 U. S. 263 ..... 15, 48
Sweezy v. State of New Hampshire, 354 U. S. 234 .. 26, 48

United Electrical Radio & Machine Workers application of, 111 F. Supp. 858 (S. D. N. Y.) 42
United States v. Andolschek, 142 F. 2d 503 (C. A. 2) 33
United States v. Bryan, 339 U. S. 323 38
United States v. Orman, 207 F. 2d 148 (C. A. 3) 48
United States v. Peck, 154 F. Supp. 603 (D. D. C.) .. 26, 29
United States v. Reynolds, 354 U. S. 1 33
United States v. Rumely, 345 U. S. 41 ..... 28, 41
United States ex rel. Toth v. Quarles, 350 U. S. 11 .. 47

Watkins v. United States, 354 U. S. 178 .....11, 17, 25, 27, 28, 29, 31, 39

Statutes

Legislative Reorganization Act of 1946 (Aug. 2, 1946, c. 753, Tit. I, 60 Stat. 831):

Section 133(f) 14, 40, 41
Section 134(c) 13, 14, 36, 37, 38, 39, 40, 41
2 U. S. C. 192 .....1, 2, 3, 10, 13, 16, 17, 24, 27, 31, 32, 37

Miscellaneous

	PAGE
Association of the Bar of the City of New York: Special Committee on the Federal Loyalty-Security Program	46
Brown: Loyalty and Security; Employment Tests in the United States (Yale Law School Lectures, 3) (1958)	46
Bureau of National Affairs: Government Security and Loyalty; A Manual of Laws, Regulations, and Procedures (1955)	46
Commission on Government Security, Report Pursuant to Public Law 304, 84th Cong. as amended (1957)	46
100 Cong. Rec. 843	26
Executive Order 9835	44
Senate Resolution 174, 84th Cong. 2d sess.	37
Shils: The Torment of Secrecy; the Background and Consequence of American Security Policies (1956)	46
"Strategy and Tactics of World Communism", Hrgs. before Subcommittee on Internal Security, 84th Cong., 2d sess.	23
Watts: The Draftee and Internal Security (1955)	46
Yarmolinsky: Case Studies in Personnel Security (1955)	46

IN THE

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No. 11

HERMAN LIVERIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 136-146) is reported at 280 F. 2d 708. The District Court wrote no opinion.

Jurisdiction

The judgment of the Court of Appeals (R. 147) was entered on June 18, 1960 (R. 147). The petition for a writ of certiorari was timely filed on August 16, 1960, and granted on June 19, 1961. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

Questions Presented

Petitioner, a director of a television station in New Orleans, was convicted of contempt under 2 U. S. C. 192,

fined and sentenced to three months imprisonment for refusing to answer certain questions at a hearing of the Internal Security Subcommittee of the Senate Judiciary Committee.[1] The questions presented are:

1. Whether the indictment of petitioner under 2 U. S. C. 192 was invalid in view of its failure to state (a) the subject under inquiry[2] by the Subcommittee at the time of the alleged contempts, (b) the pertinency to that subject of the indictment questions, (c) the willfulness of petitioner's failure to answer the questions and (d) the Subcommittee authority.

2. Whether the Government sustained its burden at the trial of showing the subject under inquiry when petitioner failed to answer the indictment questions and the pertinency to that subject of those questions.

3. Whether petitioner was adequately apprised at the Subcommittee hearing of the subject under inquiry and the pertinency of the questions.

4. Whether the Government sustained its burden of showing probable cause for summoning petitioner as a witness before the Subcommittee and for subordinating his right of privacy to the public interest, if any, involved.

5. Whether petitioner at the trial was denied the rights to a full and fair defense and of cross-examination guaranteed defendants in all criminal cases.

6. Whether Senate Resolution 366, 81st Cong., 2d sess., the charter of authority of the Subcommittee, is so vague

---

[1] The Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary of the United States Senate, herein designated "the Subcommittee" or "the Internal Security Subcommittee".

[2] To distinguish the "question under inquiry", as that term is used in 2 U. S. C. 192, from the actual questions put to petitioner as to which contempts were charged (hereinafter sometimes "the indictment questions"), we use the term "subject under inquiry" or "subject of inquiry" in lieu of the statutory term "question under inquiry".

as to invalidate the Subcommittee's power to compel testimony in the First Amendment area.

7. Whether an investigation by the Subcommittee into the "Communist Party strategy of placing its disciples in key positions in the fields of communications, news-gathering and reporting, education and other areas in which public opinion could be influenced" violated the freedoms guaranteed by the First Amendment.

8. Whether Senator Eastland, before whom the contempts charged to petitioner were allegedly committed, constituted a competent committee of the Senate within the purview of 2 U. S. C. 192.

9. Whether, in this case, involving questions relating to Communist Party membership and affiliation, petitioner was improperly denied the right to show the bias of Federal Government employee jurors and, on such a showing, to have the indictment returned by a grand jury composed in the majority of such Federal Government employees dismissed and such employees excused for cause from service on the petit jury.

10. Whether, since evidence *aliunde* was introduced to prove pertinency of the indictment questions to the subject under inquiry, the issue as to pertinency should have been submitted to the jury.

Statement of the Case

Petitioner, a director of a television station in New Orleans, was convicted for contempt under 2 U. S. C. 192, for refusal to answer fourteen questions at a hearing of the Subcommittee held on March 19, 1956, in Washington, D. C. (R. 1-3).[3]

[3] Petitioner was indicted for refusal to answer fifteen of the questions put to him at the hearing. At the trial, the court granted petitioner's motion for a judgment of acquittal with respect to Count 15.

The transcript of the Subcommittee hearing appears at R. 17-50.

Petitioner was first interrogated in a closed, executive session before Senator Eastland, at which the Count 1 and Count 2 questions were put. During this session (R. 17-21), no statement was made as to the nature of the Subcommittee's inquiry.[4]

On the same afternoon, petitioner was summoned to an open, public session, again before Senator Eastland. At the commencement of that session, Subcommittee counsel Morris read a statement which, he said, had been made by the Subcommittee chairman on a previous occasion and set forth "the purpose of the particular series of hearings" in process. The statement is extraordinarily vague and general (R. 22):

> "We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures.
>
> "Under consideration during these hearings will be the activities of Soviet agents and agencies registered with the Department of Justice and such other agents or agencies not now registered whose activities may warrant legislative action.
>
> "We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and the composition of our own Government here, as the facts bearing on these isues are gathered in the public record of this subcommittee which will enable it to make

[4] At the trial, Subcommittee counsel and Government witness Morris conceded that petitioner was not advised of the subject under inquiry either prior to or during this executive session (R. 64).

> recommendations or determinations as to whether the Internal Security Act of 1950 and other existing law should be repealed, amended or revised, or new laws enacted."

Thereafter, during the course of the hearing, various statements as to subject of inquiry were made from time to time, both by Senator Eastland and by Subcommittee counsel; their diversity and inconsistency indicating that the Subcommittee had not in fact determined upon any particular subject of inquiry. Soon after the commencement of the public session, petitioner reiterated objections which he had earlier interposed, to the jurisdiction and power of the Subcommittee to question him as to his personal affairs and political opinions and beliefs (R. 28, 41-50). Senator Eastland, regarding those objections as, at least in part, directed to the issue of pertinency, insisted that the questions put were "pertinent to this inquiry" and stated (R. 33):

> "The question, Mr. Liveright, is very pertinent. We are attempting to see what amendments are needed to the Internal Security Act. In addition, and as part of that, we are tracing the activities of the Communist Party in this United States."

Shortly thereafter, in connection with the Count 9 question, Senator Eastland stated that the Subcommittee wished "to know how this [Communist] conspiracy is financed" (R. 36) and that the purpose of the inquiry was to enable the Subcommittee to draft "legislation to protect the welfare and the safety of our country" (R. 37).

Earlier, after inquiring into petitioner's educational and employment history, Morris, addressing Senator Eastland, had stated that the "purpose of subpoenaing this witness and asking him the following questions is to determine to what extent * * * [petitioner's] activities had been carried out in New Orleans in the framework of the

Communist Party and to what extent they have been carried out in some other framework" (R. 32).

The interrogation of petitioner related to petitioner's political associations, including questions whether he had been a member of the Communist Party in 1943 (thirteen years prior to the Subcommittee hearing) and whether he was at the time of hearing, in 1956, a member of or affiliated with the Party. Protesting that the Subcommittee had no jurisdiction or power to inquire into such associations, petitioner refused to answer such questions.

Petitioner was indicted for contempt on November 26, 1956 (R. 1-3). Thereupon, he moved to dismiss the indictment on the grounds, *inter alia,* (a) that the indictment was invalid for failure to allege the subject under inquiry by the Subcommittee at the time of the alleged contempts and the pertinency to that subject of the questions put to petitioner, and (b) that the indictment was void in that more than twelve members of the indicting grand jury were Federal Government employees and, because of the fear engendered by the Government's loyalty and security programs, actually prejudiced and biased against petitioner (R. 4-8). An affidavit of petitioner's counsel was filed in support of the charge of bias. Petitioner requested that if the indictment were not dismissed on that ground, a preliminary hearing should be held at which he might "offer proof, by examination of grand jurors and otherwise, that bias or prejudice existed on the part of more than twelve members of the grand jury who concurred in the Indictment" (R. 8). The trial court denied the motion to dismiss and the alternative request for a hearing to examine into the bias of the grand jury (R. 10).

Prior to the trial, subpoenas were issued to the Subcommittee's chief counsel and the Senate Clerk directing that they produce, *inter alia,* all Subcommittee records relating to petitioner and minute books covering the series

of investigations and hearings in the course of which petitioner had been summoned (R. 8-9). On the Government's motion, the trial court quashed these subpoenas (R. 10-11). In view of this ruling, petitioner moved that the indictment be dismissed for denial of an opoprtunity to petitioner to make a full and fair defense. This motion was denied by the Court (R. 53).

The case was tried to a jury, on which Federal Government employees served, the court having previously denied petitioner's motion to disqualify such employees for cause (R. 10).

At the commencement of the trial, over petitioner's objection, the court ruled that both the issues (a) as to pertinency of the questions to the subject under inquiry and (b) as to the competence of the Subcommittee at the time of the inquiry, were for the court and that no testimony relating to those issues might be adduced before the jury (R. 53-54).

Robert Morris, the Subcommittee's chief counsel, was the Government's only material witness. Before the jury, Morris read the transcript of petitioner's testimony (R. 54-56, 17-50). Before the court, the jury having been excused, Morris testified as to (a) information allegedly in the Subcommittee's file which, so he stated, had caused it to summon petitioner as a witness, (b) the purported purposes of the Subcommittee's inquiry, and (c) the Subcommittee's authority and procedures (see R. 56-123, *passim*).

Morris' testimony is considered in detail in connection with the several points of the Argument, *infra*. As to the cause for summoning petitioner, Morris testified in substance that the Subcommittee had been informed that petitioner had been "active in Communist activities in New York" and had been sent to New Orleans as "a secret member of the Communist Party in New Orleans" (R.

76-78; see, also, R. 79, 80, 81, 97-98, 99). When, however, petitioner sought to cross-examine as to the veracity of the witness and the details and sources of that information and to inspect it insofar as it may have been in writing, the trial court barred him from doing so (R. 97-98, 100, 117). In view of these limitations on cross-examination, petitioner moved that Morris' testimony be stricken (R. 123-125). The Court denied this motion (R. 125).

As to the subject under inquiry by the Subcommittee, Morris' testimony was, in substance, that the subject of the Subcommittee's inquiry at the time of petitioner's appearance was the same as it had been at all times—"the activities of the Communist organization as it operates within the United States" (R. 90). He said that the Subcommittee had in fact not confined itself to any particular purpose (R. 112), but instead had considered the subject under inquiry coextensive with the broad terms of its enacting Resolution (R. 93-94, 101-102).

Morris' testimony in this regard was consistent with the Government's theory of the case. Throughout the trial, the Government prosecutor firmly and consistently took the position that there was no subject under inquiry here narrower than the broad terms of Senate Resolution 366; that there "is no such thing as a matter under inquiry, anything more narrow than the full powers of the committee" (R. 58); that "there is no single subject and scope" (R. 60).

Petitioner's motion for a judgment of acquittal at the close of the Government's case was denied (R. 126-127).

Opening his case, petitioner vainly renewed his request for enforcement of the subpoenas previously issued to the Subcommittee and the Senate (R. 127). Petitioner then made a proffer of proof, stating that the subpoenaed materials would prove, *inter alia*, that the Subcommittee had no reason to summon petitioner; that the Subcommit-

tee, in its inquiry, was engaged not in a legislative purpose but solely in an effort to harass petitioner and to expose him to the contempt of his associates and the public; that the Subcommittee was not acting with the least possible power commensurate with legislative purposes; and that petitioner's First Amendment rights had been impaired without justification (R. 127-129).

Petitioner's motion for acquittal at the close of the case was denied (R. 130-131).

Over petitioner's exceptions, the court submitted the case to the jury, charging as matters of law (a) that Senator Eastland, sitting alone, was, at the time and place of the inquiry involved, a duly constituted committee of the Senate inquiring into a matter within duly delegated authority and (b) that the indictment questions were pertinent to the subject under inquiry by the Subcommittee (R. 131-134). The court did not, however, specify the nature of the Subcommittee's subject under inquiry.

The jury returned a verdict of guilty on each of the counts submitted to them, Counts 1 through 14.[5] On March 22, 1957, the trial court entered a judgment of guilty and imposed sentence of a $500 fine and three months imprisonment (R. 12).

Notice of appeal to the Court of Appeals was filed on March 22, 1957 (R. 12). On June 18, 1960, the Court of Appeals affirmed the conviction (R. 147), on an opinion which, as to the nature of the subject of inquiry, was markedly different from the Government's position on the trial. See *infra*, pages 21-24.

This Court granted certiorari on June 19, 1961.

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[5] The court left to the jury only the issues (1) whether the indictment questions had been put to petitioner, (2) whether petitioner had refused to answer them, and (3) if so, whether his refusal was a willful refusal (R. 132).

Summary of Argument

I

The indictment here charged that petitioner "unlawfully refused" to answer questions "pertinent to the question then under inquiry" before the Subcommittee. It did not state the subject of the inquiry which the Subcommittee was conducting, its authority to conduct that particular inquiry, the respects in which the questions set forth in the indictment were pertinent to the subject of inquiry and the fact that petitioner's refusal to answer was willful.

The indictment in this case is, therefore, insufficient in that it is couched in generic terms and in that it fails to state essential elements of an offense under 2 U. S. C. 192. Petitioner here relies on Argument I in the brief for petitioner in *Price* v. *United States,* No. 12, this Term, and requests reversal of the conviction on the authorities there presented.

II

Reversal is also required by reason of the Government's failure at the trial to show the subject of the Subcommittee's inquiry and to establish the pertinency of the indictment questions. In a prosecution under 2 U. S. C. 192, the Government has the duty to prove the pertinency of the questions, and the first step in doing so is to show the subject of inquiry. The trial record in this case—the transcript of the Subcommittee hearing and the testimony of Subcommittee counsel and Government witness Morris—fails to supply a satisfactory explanation of subject under inquiry. The statements at the hearing attributed to the Subcommittee relating to subject of inquiry are vague and general. Both the Government prosecutor and Subcommittee counsel at the trial conceded that they furnish no precise definition of the subject under inquiry.

The Government's theory of prosecution was that there was no particular subject and that the subject of inquiry here was as broad and no more narrow than the full powers of the Subcommittee enunciated in its charter, Senate Resolution 366.

Senate Resolution 366, however, offers no greater enlightenment as to the nature of the Subcommittee's inquiry in this case than did the charter of the House Committee in *Watkins* v. *United States,* 354 U. S. 178, of which this Court said, "it would be more difficult to imagine a less explicit authorizing resolution" 354 U. S. at 202. Comparison of both resolutions discloses, that, if anything, Resolution 366 is more imprecise than the House charter.

It is plain from the record here that neither the Subcommmitee at the hearing nor the Government at the trial deemed it necessary to establish or prove a particular subject of inquiry. The subsequent efforts of the Court of Appeals to supply this lack are futile because they are not supported by the record and they suffer from the infirmity of *post litem motam* self-serving declarations.

No subject of inquiry having been shown, there was, of course, no proof of pertinency.

In view of the Government's failure in these respects and the failure of the trial court to find a subject of inquiry, the conviction must be reversed.

• • • •

The failure to delimit the subject of inquiry requires reversal also because the nature of that subject and the pertinency of the questions were not made luminous to petitioner at the time he appeared before the Subcommittee. Whatever may have been the form of the objections lodged by petitioner at the Subcommittee hearing, Senator Eastland, purportedly sitting as the Subcommittee, understood them to be, at least in part, directed to the issue of per-

tinency. Thus, the obligation of the Subcommittee clearly to state the subject under inquiry and the pertinency of the questions was "triggered off". Senator Eastland sought to explain how the questions were pertinent. Unfortunately, however, his endeavors were unavailing, for his explanation was in such general terms, it fell far short of the standard for precision imposed by the decisions of this Court.

III

Petitioner was unduly restricted in his right to cross-examination with respect to the issue of probable cause.

As this Court has made clear, the Government was required to establish the circumstances which in its view constituted probable cause for subpoenaing petitioner as a witness before the Subcommittee. Proof of probable cause is material to a prosecution under 2 U.S.C. 192.

The Government made an attempt to sustain its burden in this respect by adducing testimony that the Subcommittee had received certain information concerning petitioner's activities and associations. Plainly, petitioner was entitled to test the veracity of the Government's witness and to determine whether such information existed and whether there was probable cause for subpoenaing petitioner. Notwithstanding, the trial court quashed a subpoena issued to Subcommittee counsel directing the production of such information and barred reasonable cross-examination on the details and sources of the information testified to on direct examination. This obstruction of petitioner's rights to engage in reasonable cross-examination and to make a full defense violated fundamental rights of petitioner as a defendant in a criminal prosecution.

Reversal of the conviction is required by reason of this error at the trial.

IV

Senate Resolution 366, the charter of the Subcommittee, is unconstitutional and vague thereby impairing petitioner's First and Fifth Amendment freedoms. On this point, petitioner here relies on Argument VI in the brief of petitioner in *Price* v. *United States,* No. 12, this Term, and requests reversal on the authorities there presented.

V

As previously indicated, there has been no showing in this case of a subject under inquiry by the Subcommittee at the time of petitioner's appearance. Nevertheless, the Court of Appeals has found "the subject of the investigation to be Communist Party tactics, infiltration and penetration into geographical areas and into particular professional groups including communications media." If that was the subject of inquiry here, we are presented with an investigation by a Congressional committee in violation of First Amendment freedoms.

On this point, we adopt and respectfully refer the Court to the discussion in Argument I of the brief for petitioner in *Shelton* v. *United States,* No. 9, this Term (pp. 29-57).

VI

The tribunal before which petitioner allegedly committed the contempts charged was not a competent committee of the Congress contemplated by 2 U. S. C. 192. This, for two reasons:

(1) Senator Eastland, who purported to sit alone as the Subcommittee, sat at a time when the Senate was in session and without first having secured leave from the Senate to sit at that time. The hearing consequently was held in violation of Section 134(c) of the Legislative Reorganiza-

tion Act of 1946, which prohibits Congressional committees (except the House Committee on Rules) from sitting while the Senate or the House is in session without special leave of the Senate or the House, as the case may be.

Contrary to the holding of the Court of Appeals, this infirmity in the authority of the Subcommittee was a matter available to petitioner as a defense. Section 134(c) was intended, at least in part, to protect the rights of witnesses before Congressional committees. For, it is most essential for such witnesses that all committee members, or as many as possible, attend committee hearings, so that the interests of the private witness in remaining silent can be carefully weighed against the countervailing interest of the Congress in securing information at the expense of his First Amendment freedoms.

(2) Senator Eastland, purporting to sit alone as the Subcommittee, failed to comply also with section 133(f) of the Legislative Reorganization Act of 1946, insofar as the executive session of the hearing was concerned (at which the Count 1 and Count 2 questions were put to petitioner). That provision of the 1946 Act required that all hearings of the Subcommittee be open to the public except where the committee by a majority vote orders an executive session. It is undisputed that an executive session was not so ordered here.

VII

The indictment returned here was invalid because a majority of the grand jurors who returned it were Federal Government employees.

Prior to the trial, petitioner moved to dismiss the indictment upon an affidavit affirmatively showing that, because of their fears by reason of the Federal loyalty and security programs, there was actual bias and fraud on the part of thoes jurors. Alternatively, petitioner moved for a hear-

ing at which he might offer testimony to show such bias. The District Court denied these motions.

Dismissal of the indictment on the ground advanced by petitioner, or, at the least, the holding of the preliminary hearing to permit petitioner to show the bias of the Federal Government grand jurors was required by this Court's decisions in *Frazier* v. *United States,* 335 U. S. 497, and *Dennis* v. *United States,* 339 U. S. 162.

The refusal of the District Court to dismiss the indictment or to convene such a preliminary hearing requires reversal of petitioner's conviction.

VIII

In view of the fact that the Government at the trial of this case adduced oral testimony on the issue of pertinency, that issue was one of fact and should have been submitted to the jury. The trial court's withdrawal of the issue from the jury requires reversal of the conviction here.

We are aware of this Court's decision in *Bratten* v. *United States,* 365 U. S. 431, that the question of pertinency is one of law for determination by the court. We respectfully suggest, however, that the application of the *Sinclair* rule to a case such as the instant one, where evidence *aliunde* was introduced to prove pertinency, is misplaced.

I.

The indictment was insufficient because it failed to set forth essential elements of the crime: subject matter of inquiry, pertinency, willfulness and Subcommittee authority.

The indictment against petitioner alleged only that, as a witness before the Subcommittee, he was asked questions "which were pertinent to the questions then under inquiry" and that he "unlawfully refused to answer those pertinent questions" (R. 1).

The indictment was, therefore, insufficient. This, because it stated the offense merely in the generic term of the statute and, more significantly, because it failed to set forth essential elements of the crime: the subject of the inquiry, the respect in which the questions were pertinent, that the refusal to answer was a willful one and that the Subcommittee had authority to take testimony. Petitioner's motion to dismiss the indictment for these defects was denied (R. 10).

On this point, petitioner relies on Argument I of the brief for petitioner in *Price* v. *United States,* No. 12, this Term, and requests reversal on the authorities there presented.

II.

The Government at the trial failed to show the subject of the Subcommittee's inquiry and to establish the pertinency of the indictment questions. Furthermore, these matters were not made "luminous" to petitioner at the time of the Subcommittee's hearing.

In a prosecution under 2 U. S. C. 192, the Government has the "duty at the trial to prove that the questions propounded by the congressional committee were in fact 'pertinent to the question under inquiry' by the committee",

and the "first step in proving that component of the offence * * * [is] to show the subject of the subcommittee's inquiry" at the time the indictment questions were put to this witness. *Deutch* v. *United States*, 367 U. S. 456 (prelim. print), 81 S. Ct. 1587. Precise delineation of the subject under inquiry is essential not only to assure due process to the defendant but also to enable the courts, in a prosecution under 2 U. S. C. 192, to determine whether the indictment questions were in fact "pertinent to the question under inquiry" and a conviction in the particular case justified. As Mr. Justice Frankfurter stated, concurring in *Watkins* v. *United States*, *supra*, 354 U. S. at 217:

> "* * * the scope of inquiry that a committee is authorized to pursue must be defined with sufficiently unambiguous clarity to safeguard a witness from the hazards of vagueness in the enforcement of the criminal process against which the Due Process Clause protects. The questions must be put with relevance and definiteness sufficient to enable the witness to know whether his refusal to answer may lead to conviction for criminal contempt and to enable both the trial and the appellate courts readily to determine whether the particular circumstances justify a finding of guilty."

The Government failed to make the necessary showing in this case.

The trial record on the issue of pertinency consists of the transcript of the Subcommittee hearing and the testimony of Subcommittee counsel Morris. Neither the transcript nor Morris' testimony supplies a satisfactory particularization of subject under inquiry. On the contrary, both exhibit such an utter disregard of the need for precision and such hopeless confusion as to make it impossible to adduce the subject of the Subcommittee's inquiry at the time, if indeed there was any.

As we have indicated (*supra*, p. 4), petitioner was not advised at all as to the nature of the Subcommittee's inquiry prior to or during the executive session, at which the Counts 1 and 2 questions were put to him (R. 17-21, 64). At the commencement of the open, public session, Morris read the statement quoted above, *supra*, pp. 4-5, purporting to set forth the "purpose of the particular series of hearings" being held by the Subcommittee (R. 21). That statement, however, is in the most general terms and encompasses a full investigation of the Communist Party and of Soviet activity, both here and abroad (R. 22).

The generality of the "opening statement" was compounded by the equally broad statements made by Senator Eastland shortly thereafter. Senator Eastland said that the Subcommittee was "attempting to see what amendments are needed to the Internal Security Act" and, "as part of that, * * * tracing the activities of the Communist Party in this United States" (R. 33). Later, Senator Eastland sought to justify a question by defining the Subcommittee's purpose as a desire "to know how this * * * [Communist] conspiracy" is financed so that it might be enabled "to draft legislation to protect the welfare and the safety of our country" (R. 36-37).

This is the sum of the statements at the hearing relating to the subject of the inquiry attributed to the Subcommittee.[6] At the trial, both the Government prosecutor

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[6] The remarks of counsel Morris, directed to Senator Eastland, that the purpose of interrogating petitioner was "to determine to what extent * * * [his] activities have been carried out in New Orleans in the framework of the Communist Party and to what extent they have been carried out in some other framework" (R. 32) were not shown to have been authorized by the Subcommittee or to have reflected a Subcommittee decision. There is no suggestion that Subcommittee counsel was authorized to establish subjects of inquiry for the Subcommittee.

and Subcommittee counsel Morris conceded that such statements did not in any wise furnish a precise definition of the subject under inquiry, within whose frame of reference the issue of pertinency could be resolved.

Throughout the trial, Morris persistently rejected efforts of petitioner's counsel to ascertain the particular subject under inquiry. He vigorously insisted that at the time petitioner appeared, the subject was no different from and no more specific than that in which the Subcommittee had continuously engaged since 1951, when first established —"the investigation of the Communist movement within the United States (R. 86). Asked whether the inquiry as to petitioner represented "a separate investigation", he replied unequivocally, "No, it did not" (R. 89). He testified, as follows (R. 90, emphasis supplied):

> "This investigation, as I say, it is continuous and unchanging. *The subject matter of the investigation at all times is the activities of the Communist organization as it operates within the United States.*"

The hearing at which petitioner testified, Morris said, was "part of a continuing investigation • • • a *one entity which never terminates, and which is broken down solely for purposes of administration and editorial work* • • • [*and*] *putting out annual reports*" (R. 93, emphasis supplied.[7]

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[7] Morris dismissed the varying editorial headings under which the testimony of Subcommittee witnesses was published as meaningless so far as definition of subject under inquiry was concerned. Thus, although petitioner's testimony was published in the series entitled "Scope of Soviet Activity" and another witness' (William Price's) in the series designated, "Strategy and Tactics of World Communism, Communist Activity in New York", Morris testified that such differences were matters solely of "editorial distinction" and that the hearings of *all* witnesses were held within the *very*

In short, however diversely the Subcommittee may have designated its several investigations, the subject of all was the same: "the activities of the Communist organization * * * within the United States" (R. 90).

Government witness Morris' testimony in this regard was wholly consistent with the Government's theory on the prosecution of this case. No sooner had petitioner's counsel begun to examine into the subject under inquiry than

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same subject "framework" (R. 85, 86, 91). His testimony was, as follows (R. 90, emphasis supplied):

> "At every year and sometimes during the year, for the purposes of our rendering reports, and for the purposes of our having editorial distinctions made, for the purpose of issuing our publications, we very often give a different title to the series of hearings. It adds interest to the work of the subcommittee; *but it in no way changes the nature of the underlying investigation.*
>
> "Now at the particular time of February 1, 1956, not only was a new legislative committee year beginning, but there was a new chief counsel, and it was just a device the subcommittee undertook in order to present a new facet to the same work that had been going on all these years."

The editorial heading variations were designed, Morris said, merely to keep the Senators' interest from flagging:

> "* * * It has to be different * * * in order to make it presentable, or to keep interest alive in the thing, you have to keep changing the framework.
>
> " * * the senators, being human beings, like to have the thing presented in different ways—the committee evidence." (R. 102)
>
> * * *
>
> "And very often, senators being human beings, if evidence comes in, we like to put things relating to the same particular subject in the same series of hearings.
>
> "Now if you are talking about a newspaper investigation, you like to put all the newspapers in together; and if you are talking about Communists in government, you put all of those together. But *it is the same investigation*, even though you may issue separate reports on them." (R. 93, emphasis supplied)

the prosecutor, insisting that such an examination was irrelevant, succinctly stated, as follows:

> "• • • the power this committee had and the business it was investigating was the entire breadth of its powers under Resolution 366. *And at no time has this since been narrowed down to any particular subject, such as a topic, or a particular geographic location, or a particular and a narrower activity. There is no such thing as a matter under inquiry, anything more narrow than the full powers of the committee*" (R. 58, emphasis supplied).

This was the Government's view throughout. It never attempted to show, because it deemed it unnecessary to show, any particular subject under inquiry. It regarded the entire breadth of Resolution 366 as the ever-continuing and unchanging subject of investigation by the Subcommittee, and all questions put to petitioner pertinent so long as they came within the vast umbrella of that Resolution's general grant of power. "*Our position*", the prosecutor stated, "*is that there is no single subject and scope*" (R. 60, emphasis supplied).

The trial court apparently shared this view. For, although it charged the jury that the questions put to petitioner were pertinent, it never troubled to say to what subject they were pertinent. The Court observed that the questions were "generally with reference to the subject of Communism" (R. 72), an area coextensive with the scope of the authorizing Resolution; petitioner's conviction was therefore justified even though no particular subject under inquiry was proved.

In light of (a) the Government's insistence at the trial that there was no particular subject under inquiry by the Subcommittee in this case, (b) the disclaimer by its only witness of any such specific subject, (c) the ready acceptance of the Government's view by the trial court and (d) the court's failure to make any finding of a particular sub-

ject; the opinion of the Court of Appeals sustaining the conviction is plainly nothing more than judicial afterthinking. *Cf. Deutch* v. *United States, supra,* 81 S. Ct. at 1595.

The opinion of the Court of Appeals appears first to suggest that the subject under inquiry was "the Communist Party strategy of placing its disciples in key positions in the fields of communications, news-gathering and reporting, education and other areas in which public opinion could be influenced" (280 F. 2d at 712). This the Court apparently divines from the fact that "volunteered testimony of Winston M. Burdett, a prominent foreign correspondent and radio and TV newscaster, who appeared before the Subcommittee in 1955, had disclosed to the Subcommittee a widespread effort of the Communist Party to place persons under its discipline in positions of key importance in news-gathering and news dissemination media, including radio, television and newspapers" (280 F. 2d at 711), and that the Subcommittee had thus been made aware of such infiltration (280 F. 2d at 712).

If, in fact, this was the subject under inquiry at petitioner's hearing—and there is no proof it was—petitioner's conviction can hardly be justified. For, not a single one of the indictment questions is germane to an inquiry into Communist Party infiltration in "the fields of communications, news-gathering and reporting, education and other areas in which public opinion could be influenced", nor does the record show how any of the questions could possibly be pertinent to such a subject.

At the trial, Morris did say that a statement read at a previous Subcommittee hearing, on January 4, 1956, referring to the Burdett testimony (R. 87-88), was "similar in content" to or "the same thing" as the "opening statement" read at the commencement of the public session

here (R. 86, 88) and he casually characterized the investigation here as one into "Communist penetration into the field of communications" (R. 97, 101). But the Burdett testimony was not even once mentioned during the entire course of the Subcommittee hearing, and there was not the slightest suggestion at the time that the Subcommittee was in the least interested in Communist infiltration into communications media. It is significant also that when Burdett testified, in June, 1955, almost a year before petitioner was summoned, he did not mention petitioner at all. The Court of Appeals points this out (280 F. 2d. at 711):

> "* * * Burdett gave the Subcommittee names and details of Communist Party infiltration, activities and techniques. Burdett did not give information about appellant [i.e., petitioner]."[8]

Having formulated the subject under inquiry by reference to the earlier Burdett testimony, the Court of Appeals then inexplicably shifts to another and different for-

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[8] It is noteworthy also that J. G. Sourwine, who was the Subcommittee's chief counsel at the first series of hearings arising from the Burdett testimony, expressly disclaimed that Communist infiltration into the field of communications was the subject of the Burdett-inspired hearings. When the first witness at those hearings, James S. Glaser, remarked that the New York Times had reported that the "announced reason for this hearing was an intent to investigate Communist infiltration of the press and other forms of communication", Mr. Sourwine declared:

> "For your information, the committee has made no such announcement. It is not accurate * * *" ("Strategy and Tactics of World Communism", Hrgs. before Subcommittee, 84th Cong., 2d sess., Part 17, p. 1616).

During the interrogation of a later witness at the same series of hearings, Sourwine defined the subject under inquiry in the same broad terms as those on which the Government insisted during the trial of this case:

> "The subject matter of the committee's inquiry is Communist activity and the committee is proceeding on the basis of previous testimony and information furnished to it with respect to Communist activity" (*Id.* at 1652).

mulation. It suggests that the subject under inquiry was "Communist Party tactics, infiltration and penetration into geographical areas and into particular professional groups including communications media" (280 F. 2d at 713). It then states: "Assuming, arguendo, that the subject covered by the Senate Resolution was, in this case, not sufficiently specific and concrete * * *, the opening statement * * * carefully pointed out at least one narrow and specific area or subject of inquiry * * * 'the structural revisions that the Communists have made in their network in order to avoid detection, and * * * to trace the movement of individual agents through these changing structures' " (*Ibid.*).

Comparison of the "opening statement" with Senate Resolution 366, however, demonstrates that the statement is no more than an expanded paraphrase of the Resolution. Cf. *Deutch* v. *United States, supra,* 81 S. Ct. at 1592; *Barenblatt* v. *United States,* 252 F. 2d 129, 136, aff'd 360 U. S. 109. The Government prosecutor conceded this, remarking that the "opening statement was about as broad as the entire authority of the committee" (R. 118). The trial court agreed: " * * * I don't see how it can much broader * * * " (R. 118). The one sentence which the Court of Appeals excerpts from the statement— "We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures"—abounds in the same generalities as does the authorizing Resolution; it is certainly no more precise.

The record inevitably leads to the conclusion, therefore, that the frame of reference on which the Government relied for proof of pertinency in this case was Senate Resolution 366 and that alone. Unless that Resolution affords a definition of the subject under inquiry adequately precise to satisfy the requirements for conviction under 2 U. S. C. 192, the conviction of petitioner cannot stand.

Resolution 366, however, offers no greater enlightenment as to the subject of inquiry in this case than did the charter of the House Committee on Un-American Activities in *Watkins, supra.* Of the latter, this Court said, "it would be more difficult to imagine a less explicit authorizing resolution." *Watkins, supra,* 354 U. S. at 202. If anything, the Senate Resolution is even more imprecise than the House charter. The House resolution, in pertinent part, authorizes the House Committee to investigate

> "* * * the extent, character, and objects of un-American propaganda activities in the United States * * * the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and * * * all other questions in relation thereto that would aid Congress in any necessary remedial legislation" (*Id.* at 201-202).

The pertininent portion of the Senate resolution empowers the Subcommittee to investigate

> "* * * the administration, operation, and enforcement of the Internal Security Act of 1950 * * * [and] of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and the extent, nature and effects of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign governments or organizations controlling the world Communist movement or any other movement seeking to overthrow the government of the United States by force and violence" (*infra,* pp. 50-51).

A former chairman and vigorous champion of the Subcommittee, Senator Jenner, frankly conceded that it was hopeless to look to the authorizing Resolution for any com-

prehension of the subject at any time under inquiry. Senator Jenner said:

> "* * * the Subcommittee on Internal Security was set up by resolution primarily to look after the internal security of the United States. However, it must be realized that *it is hard to draw a line indicating where the subject begins and where it ends*" (100 Cong. Rec. 843, emphasis supplied).

Subparagraph (3) of Senate Resolution 366, which the court below found especially explicit (*Shelton* v. *United States*, 280 F. 2d 701, 704), embodies a grant of power quite like that in the New Hampshire enabling resolution stricken down for vagueness in *Sweezy* v. *State of New Hampshire*, 354 U. S. 234. The Subcommittee's power to investigate "the extent, nature and effects of subversive activities in the United States" is patently quite the same as that vested in the New Hampshire legislature to investigate "with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said Act are presently located within this state." *Id.* at 236. This Court said that such a mandate was so "sweeping and uncertain" that it afforded "no assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed when it initiated this inquiry. The judiciary are thus placed in an untenable position * * *" *Id.* at 253, 254. See, also, *United States* v. *Peck*, 154 F. Supp. 603 (D. D. C.) where, on such grounds, Judge Youngdahl held Senate Resolution 366 void for vagueness.

In every case where convictions under 2 U. S. C. 192 have been sustained for contempts committed before the House Committee, this Court has required that the subject under inquiry be defined in terms more precise than those found in the authorizing resolution or a paraphrase of that resolution. See *Barenblatt* v. *United States*, *supra*, 360 U. S. at 124; *Braden* v. *United States*, 365 U. S. 431, 435;

McPhaul v. *United States*, 364 U. S. 372, 374, 381; cf. *Sacher* v. *United States*, 356 U. S. 576, 577. An equally precise statement was necessary but lacking here.

What inescapably emerges from the record in this case is that the Subcommittee gave no thought at all, at the hearing during which petitioner's contempts were allegedly committed, to the need for confining its inquiry to any particular subject. The hearing was held in March, 1956, more than a year before this Court decided *Watkins, supra*, and more than three years before it decided *Barenblatt, supra*. When it was held, the Court had yet to articulate the rule requiring Congressional committees to limit their inquiries to particular subjects, so that both witnesses and the courts might be enabled to determine the pertinency of the questions put. The Subcommittee did not consider it necessary so to limit its investigation. As was its then practice, it engaged in a general, roving inquisition.

It seems a minimal requirement, however, for a conviction under 2 U. S. C. 192 that a precise subject of inquiry shall have been determined by the Congressional committee antecedent to the committee hearing and certainly antecedent to the trial. The Government should not be permitted to prove a subject for the first time at the trial and independently of committee action and decision. To permit conviction on such proof would appear to violate fundamental rights of defendants in Federal criminal prosecutions.

In any event, the trial in this case likewise antedated the *Watkins* and *Barenblatt* decisions. And the Government's position at the trial, like the Subcommittee's at the hearing, was that it was quite unnecessary to show any particular subject under inquiry and sufficient only to show that the indictment questions were within the broad terms of the vague authorizing Resolution.

Contrariwise, the Court of Appeals endeavored to spell out a particular subject of inquiry because its decision

followed the rulings in *Watkins* and *Barenblatt*. The Court of Appeals' efforts, however, are futile not only because they are not supported by the record, but because they suffer from "the usual infirmity of *post litem motam*, self-serving declarations." *United States* v. *Rumely*, 345 U. S. 41, 48.

The Government having failed at the trial to show the subject under inquiry at the time petitioner testified before the Subcommittee and the trial court having failed to find that there was any particular subject under inquiry, the conviction of petitioner must be reversed.

Since there was no adequate proof of the subject of inquiry here, there was no proof that the indictment questions were "pertinent" within the terms of the statute.

* * *

The failure here to delimit the Subcommittee's subject of inquiry is fatal to the conviction of petitioner for another reason—because, contrary to "the requirement of the Due Process clause of the Fifth Amendment * * * the pertinency of the interrogation to the topic under * * * inquiry * * * [was not] brought home to the witness at the time the questions * * * [were]put to him." *Deutch* v. *United States, supra*, 81 S. Ct. at 1593.

The subject of inquiry was obscured at the time of hearing, first, by the generality with which the purpose of the inquiry was purportedly stated in the general references made: the "extent [to which] Soviet power operates through the Communist Party * * * and to what extent other organizations have been devised to effectuate its purposes" (R. 22); to "activities of Soviet agents and agencies" (*Ibid.*); "activities of the Communist Party" (R. 33); the Communist "conspiracy" (R. 36). Such references certainly could not afford any notice to the witness as to subject of inquiry intelligible enough to permit a reasonable determination as to the pertinency of particular questions put.

Nor were the few feeble attempts at specificity helpful. For, when Senator Eastland did particularize, his references

were so scattered and diverse as further to confuse. Thus, at one point, the Senator characterized the purpose of the Subcommittee's inquiry as an attempt "to see what amendments are needed to the Internal Security Act" (R. 33); at another, "as part of that * * * [to] tracing the activities of the Communist Party in the United States (*Ibid.*); and at still another point, "to know how this * * * [Communist] conspiracy is financed" (R. 36). At best, petitioner was left guessing by these variant comments as to the nature of the Subcommittee's inquiry.

It was a similar shifting of alleged subjects of inquiry that led this Court to reverse convictions for contempt both in *Watkins* v. *United States, supra,* and *Sacher* v. *United States,* 356 U. S. 576, the latter case involving this very Subcommittee. And these are the very considerations which led Judge Youngdahl to direct an acquittal in *United States* v. *Peck, supra,* a prosecution for contempt against a witness before this very Subcommittee, Judge Youngdahl saying (154 Supp. at 611):

> "That the question under inquiry was not 'luminous' to the witness is the result of the precise defects in the method of exercising legislative authority which were involved in Watkins * * * . In this case, too, the Subcommittee ranged over many subjects during the course of its investigations; did not clearly establish any lines of demarcation between series of investigations, and did not restrict its questioning of the witnesses to any one field. The witness could not be aware of the subject matter under inquiry because there was no subject, except for the broad, vague, general authority of the Subcommittee."

The Government has, however, contended that this argument is not available to petitioner because—so the Government insists—he did not expressly object on grounds of pertinency at the time of the Subcommittee hearing. In this regard, the Government points to the close similarity between petitioner's objections and those of the witness in

Barenblatt v. *United States, supra.* The circumstances of the two cases are, however, markedly different.

First, whatever the form of the objections here may have been, Senator Eastland regarded them when made as directed, at least in part, to the issue of pertinency. This is indicated by the manner in which he replied to the objections. When petitioner restated them shortly after the public session began, the Senator proceeded to explain why the questions being put to petitioner were "pertinent to this inquiry" (R. 32-33). Thus, petitioner's objections were sufficient in fact to "trigger off" the Subcommittee's obligation to make pertinency luminous to the witness. Unfortunately, however, Senator Eastland's endeavors were unavailing, for his explanations were in such general terms they fell far short of the standard for precision which this Court's decisions impose.

The case is different from *Barenblatt* in other significant respects. In *Barenblatt* (a) the "subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education"; (b) just prior to the witness' appearance, the scope of the day's hearings had been announced with even greater particularity; (c) the witness had heard the committee interrogate another witness, Crowley "along the same lines as he was evidently to be questioned"; and (d) the witness "had listened to Crowley's testimony identifying him as a former member of an alleged Communist student organization." 360 U. S. at 124-125.

None of these conditions was present in our case, and petitioner enjoyed no elaborate notification of the subject under inquiry such as was afforded in *Barenblatt.* First, as the Government admitted at the trial, there was no statement of subject under inquiry more precise than the vague broad terms of Resolution 366. Second, at no time was the scope of the hearing announced with any degree of specificity or particularity approximating the

announcement prior to the witness' appearance in *Barenblatt*. Third, petitioner heard no other witness testify before him, as in *Barenblatt*. Finally, petitioner heard no witness identify him as a member of a Communist organization, as in *Barenblatt*; and, so far as the record shows, no witness has ever so identified petitioner.

III.

Petitioner was unduly restricted in his right of cross-examination and right to make a full defense with respect to the issue of probable cause.

In prosecutions under 2 U. S. C. 192, "the court must accord to the defendants every right which is guaranteed to defendants in all other criminal cases". *Watkins* v. *United States, supra,* 354 U. S. at 208; *Deutch* v. *United States, supra,* 81 S. Ct. at 1595. One of those, fundamental to a fair trial, is the right to a reasonable cross-examination of the Government's witnesses. *Alford* v. *United States,* 282 U. S. 687; see *Reilly* v. *Pinkus,* 338 U. S. 269, 275-276. This right was denied petitioner on the trial of this case with respect to the vital issue of probable cause.

The testimony on which petitioner was denied an opportunity to cross-examine was that of Government witness Morris with respect to the cause for subpoenaing petitioner and was most material. This Court has made it clear that no person's appearance as a witness before a Congressional committee, at least where his First Amendment rights are concerned, may "follow from indiscriminate dragnet procedures, lacking probable cause for belief that he possessed information which might be helpful" to the committee. *Barenblatt* v. *United States, supra,* 360 U. S. at 134. Probable cause is relevant also to the judicial process of balancing the interest of the individual witness in

his privacy and silence against the interest of the public in his testimony. The essentiality of proof of probable cause to a prosecution under 2 U. S. C. 192 is demonstrated in Argument I of the brief for petitioner in *Shelton* v. *United States*, No. 9, this Term, which we adopt and to which we respectfully refer the Court.

Morris testified on direct that the Subcommittee had subpoenaed petitioner as a witness because it had received information concerning his so-called Communist activities (R. 75-76, 77, 78, 79, 80, 81). This information, Morris said, had been secured "from a very reliable informant • • • [o]ne whose information in the past proved to be so accurate that I would accept the information again" (R. 100). When, however, petitioner sought to inspect the information, insofar as it may have been in writing, by subpoena *duces tecum* issued to the Subcommittee counsel (R. 8-9), the trial court quashed the subpoena (R. 52-53). When petitioner tried to cross-examine as to its nature, details and sources, the court firmly cut off all such examination (R. 97-98, 100).

This was not a case such as *Barenblatt, supra,* where there had been prior testimony before the committee as to the witness' participation in Communist Party activities, thus supplying probable cause for his interrogation. See 360 U. S. at 115. No such testimony had been received as to petitioner. Only the information of which Government witness Morris testified at the trial furnished a basis for summoning petitioner.

No reason appears why Morris should have been accorded a higher status than that generally accorded Government witnesses, nor why his testimony should have been deemed sacrosanct. Yet, the trial court did accord him an extraordinary status. It would not permit petitioner to cross-examine to find out what kind of information Morris was talking about, where it had come from, whether

Morris' "informant" was a credible person, or, indeed, *whether the information ever did exist at all.* So far as we know, it may all have been the product of a fertile imagination. Petitioner was not permitted to examine. The trial court relied on the information and required petitioner to be bound without question. In view of the prior quashing of the subpoena for production of the Subcommittee's records, this meant a complete bar to inquiry into the supposed cause for subpoenaing petitioner and into the Subcommittee's urgent need to pry into his private affairs.

The Government's insistence that the information and its sources were confidential does not, of course, justify so drastic a curtailment of petitioner's rights. In a criminal prosecution, the fundamental right of cross-examination surmounts the so-called informer's privilege of the Government. *Roviaro* v. *United States,* 353 U. S. 53; *Jencks* v. *United States,* 353 U. S. 657; *United States* v. *Andolschek,* 142 F. 2d 503 (C. A. 2). As this Court said in *United States* v. *Reynolds,* 345 U. S. 1, 12, and reiterated in *Jencks, supra,* 353 U. S. at 671, " • • • since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense • • •." And, as Judge Learned Hand said, in *Andolschek, supra,* 142 F. 2d at 506:

> " • • • the prosecution necessarily ends any confidential character the [Government] documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant • • •."

In *Barenblatt, supra,* the Court assumed the difficult function of balancing "the competing private and public interests at stake" in cases like the present one, recognizing how vital it was that a proper balance be struck lest a witness' constitutional liberties be unjustly invaded. The task is a delicate one, and the " 'subordinating interest of the State must be compelling' in order to overcome the individual constitutional rights at stake" (360 U. S. at 126-127). If, however, the accused witness be thwarted, as was petitioner in this case, from inquiring into the truth or very existence of testimony offered in support of the "subordinating interest of the State" and from demonstrating—by showing that, in fact, there was no cogent reason for compelling attendance before the committee—that the inquiry was not in aid of any vital national interest, there can be no fair balancing of the conflicting "private and public interests at stake." If, as in this case, the First Amendment rights of the individual are to be subordinated merely on the *ipse dixit* of a Congressional committee's counsel, the individual's rights must inevitably yield to any committee's self-serving avowal of the legitimacy and *bona fides* of its investigation.

Petitioner was here denied the right to that effective cross-examination and right to make a full defense guaranteed the defendant in every criminal case. Petitioner's conviction must consequently be reversed.

IV.

The charter of the Internal Security Subcommittee is unconstitutionally vague, thereby impairing petitioner's First and Fifth Amendment freedoms.

Counsel here have discussed this aspect of the case in the brief submitted by them for petitioner in *Price* v. *United States,* No. 12, this Term. In order to avoid repetition, we adopt and respectfully refer the Court to that discussion, appearing in Argument VI of the *Price* brief.

V.

The Subcommittee's inquiry was in violation of petitioner's rights under the First Amendment.

As we have previously demonstrated, *supra*, pp. 16-28, there was a total absence of proof at the trial of a particular subject of Subcommittee inquiry in this case.

The Court of Appeals nevertheless found the "subject of the investigation to be Communist Party tactics, infiltration and penetration into geographical areas and *into particular professional groups including communications media*" (280 F. 2d at 713, emphasis supplied). If that finding is correct, however, we are presented with a committee investigation in violation of First Amendment freedoms.

Again, in order not unduly to burden the Court with repetition, we adopt and respectfully refer to the discussion of this point in the brief for petitioner in *Shelton* v. *United States of America*, No. 9, this Term, pp. 29-57.

VI.

The tribunal before which petitioner allegedly committed the contempts charged was not a competent committee of the Congress.

The provisions of 2 U. S. C. 192 contemplate a tribunal duly authorized to sit as a committee of the Congress at the time the contempts charged were committed. For a "tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction." *Christoffel* v. *United States*, 338 U. S. 84, 90. Senator Eastland, however, was not duly

authorized and competent to sit as a committee, as he purported to do, when petitioner allegedly committed the contempts for which he was convicted.

A. Senator Eastland was not competent to sit as a committee of Congress by reason of failure to comply with Section 134(c) of the Legislative Reorganization Act of 1946.

The indictment explicitly alleges that the Subcommittee was conducting hearings "pursuant to the Legislative Reorganization Act of 1946" (R. 1). Section 134(c) of the 1946 Act (Aug. 2, 1946, c. 753, Tit. I, sec. 134(c), 60 Stat. 832, 2 U. S. C. 190b(b)), provides, as follows:

> "No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

It is undisputed that:

(1) when petitioner appeared before Senator Eastland in the afternoon of March 19, 1956, the Senate was in session (R. 125-126); and

(2) no leave was granted by the Senate for the Subcommittee to sit at that time (R. 125).

Consequently, it is clear that, at the time of petitioner's alleged contempts, Senator Eastland was sitting in violation of the controlling statute. In short, he could not then constitute a tribunal competent to act as a committee of the Senate.

The Government has suggested that the statutory restriction was intended only to control sittings of the standing committees proper and not of their subcommittees. Such a narrow reading, however, disregards the remainder of Section 134 of the 1946 Act (see 2 U. S. C. 72b-1 and 190b(a)), which makes it plain that the proceedings of subcommittees as well as of their parent bodies are contemplated. Moreover, to read the term "committee" so restrictively would be to compel reversal of the conviction here on another ground. For, the very statute for whose

violation petitioner here stands convicted (2 U. S. C. 192) also speaks only in terms of a "committee". If, therefore, "committee" is to be read to exclude "subcommittees", petitioner cannot be found guilty of violating that section.

The Government has also argued, and the Court of Appeals has noted, that the authorization in Senate Resolution 366, 81st Cong., 2d sess., under which the Subcommittee was first created, authorizes the Subcommittee "to sit and act at such places and times *during* the sessions, recesses, and adjourned periods of the Senate * * * as it deems advisable" (emphasis supplied). Such authorization, it is said, is inconsistent with and therefore effects a *pro tanto* exception from the general restriction imposed by Section 134(c) of the 1946 Act. There is, however, no inconsistency between that provision of Senate Resolution 366 and Section 134(c). Authority to sit "*during* the sessions" of Congress is something quite different from authority to sit while a house of the Congress "is in session." This becomes obvious if one compares Section 134(a) of the Act (2 U. S. C. 190b(a)) with Section 134(c) (2 U. S. C. 190b(b)). Whereas Section 134(a) authorizes each standing committee of the Senate to sit "*during* the sessions" of Congress "as it deems advisable"; section 134(c) (which, as codified, follows immediately on the former) prohibits any such standing committee from sitting, without special leave, while the Senate "is in session." It is clear therefore that the term "during the sessions" of Congress refers to periods after Congress has convened as contrasted with periods of recess and adjournment; whereas the term "is in session" denotes those periods when a particular house of the Congress is actively engaged and sitting in debate and deliberation.[9]

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[9] Moreover, it was not in fact Senate Resolution 366 (of the 81st Congress) pursuant to which the Subcommittee here was acting, but rather Senate Resolution 174, 84th Cong., 2d sess. And Resolution 174, though its grant of substantive authority is the same as that in Resolution 366, contains no provision permitting the Subcommittee to sit "during the sessions" of Congress.

That the Subcommittee itself so construes the Legislative Reorganization Act and considers itself bound by the restriction of section 134(c) appears from the testimony of its chief counsel, whom the Government qualified as an expert on the practice and procedures of the Subcommittee (see R. 82-83). Morris testified (R. 102):

> "• • • it was our practice that whenever the Senate is sitting, we automatically get leave to sit; and we have done that on every occasion we have held a hearing when the Senate was in session."

It is clear then that, in this case, the tribunal before which petitioner appeared (Senator Eastland sitting alone) was sitting without authority and in violation of the Legislative Reorganization Act of 1946.

Nor may one contend, as the Government has insisted and the Court below apparently found (280 F. 2d at 714), that petitioner is precluded from taking advantage of this infirmity because he failed to raise it when he appeared before Senator Eastland. As this Court said, in *Christoffel* v. *United States, supra,* 338 U. S. at 88: "In a criminal case affecting the rights of one not a member [of the Committee], the occasion of trial is an appropriate one for petitioner to raise the question." *United States* v. *Bryan,* 339 U. S. 323, is not to the contrary. There the Court held that a witness who had failed to produce records in response to a subpoena issued by a congressional committee could not subsequently excuse her failure to do so by suggesting the absence of a quorum when she had failed to note the absence of quorum at the time of her appearance. But the Court explicitly distinguished that case from one involving a witness' refusal to give oral testimony (339 U. S. at 322, n. 8). And while the absence of a quorum would readily be apparent to a witness when he appeared before a committee and so be a defect he might well be charged with noting at his appearance; the fact that the

committe had that day failed to secure special leave to sit could obviously not then be known to him.

The Court of Appeals concludes, however, that this infirmity in the authority of the Subcommittee "is not a matter available to * * * [petitioner] as a defense to his actions" (280 F. 2d at 714). We assume that the Court's ruling is based on the rationale advanced by the Government to distinguish the defect in this case from that which arises from the lack of a quorum, likewise fatal to an indictment under 2 U. S. C. 192. *Christoffel* v. *United States, supra.* The Government contends that the purpose of the Legislative Reorganization Act provision here in question was "apparently to assist Congress in securing the attendance of members at legislative sessions." Rather than, as in the case of the quorum requirement, "to protect the rights of a witness" (Br. in Opposition to Pet. for Cert., p. 12, n. 2).

Concern as to the attendance of members of committees at the sessions of the Congress is, however, the very consideration which makes section 134(c) of the Legislative Reorganization Act vitally significant to the Congressional committee witness. For, it is essential to such a witness that all committee members attend the hearings at which they are called to testify. The cases before this Court disclose how frequently in recent years questions at Congressional committee hearings have invaded the citizen's privacy. Where First Amendment rights are thus involved, the witness is entitled at the very least to careful weighing of his interest in maintaining his privacy inviolate against the interest of the Congress in securing information. See *Watkins* v. *United States, supra,* 354 U. S. at 198-199. Such a consideration involves a delicate balancing of the private and governmental interests involved. To the extent it can be achieved, that balancing should be done not by one, but by all of the committee members.

It is most unfortunate and palpably unfair to a witness that, as in this case, the interests which petitioner thought so important as to risk criminal prosecution for their preservation should have been weighed against the Congressional interests by only one committee member, Senator Eastland, rather than by all the committee members. It is not unreasonable to assume that, had the Senate not been in session at the time of the Subcommittee hearing or had the Senate granted leave to the Subcommittee to sit at that time, many if not all of the eight other committee members would also have been present. And that, had they been present, a majority would have concluded that the legislative purpose—whatever it may have been—was not so important as to outweigh petitioner's interest in remaining silent. Section 134(c) of the Legislative Reorganization Act of 1946, as we read it, is designed, at least in part, to achieve just this result and thus "to protect the rights of a witness" before a Congressional committee.[10]

B. Senator Eastland was not competent to sit as a committee of Congress in executive session by reason of failure to comply with Section 133(f) of the Legislative Reorganization Act of 1946.

Section 133(f) of the Legislative Reorganization Act of 1946 (Aug. 2, 1946, c. 753, Tit. I, sec. 133(f), 60 Stat. 831, 2 U. S. C. 190a(f)), provides as follows:

> "All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session."

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[10] Nor is it any answer to say that the infirmity in the Subcommittee's authority was cured by the Senate's later citation of petitioner for contempt. An incompetent committee cannot thus be vested with authority after the fact, at least so far as to support a criminal conviction for conduct occurring before an incompetent committee. *Cf. United States* v. *Rumely*, 345 U. S. 47-48.

In this case, however, the executive session in which petitioner's alleged refusals to answer the Counts 1 and 2 questions occurred, was not ordered by a majority vote either of the parent Committee on the Judiciary or of the Subcommittee. Rather, as the record discloses, it was Senator Eastland *alone* who decided to conduct the proceedings in executive session (R. 96).

In view of this circumstance, there can be no question that there was no competent tribunal sitting when petitioner was interrogated in executive session and allegedly refused to answer these two indictment questions.

The Government apparently concedes that the executive session at which the Counts 1 and 2 contempts allegedly occurred was unauthorized. It says only that since the other counts of the indictment involved questions put to petitioner at the open, public session of the Subcommittee, this infirmity as to the executive session is of no moment (Br. in Opposition to Pet. for Cert., p. 12). The Court of Appeals does not address itself at all to section 133.

What is significant here is the Government's readiness to concede the applicability of section 133 of the Legislative Reorganization Act of 1946, where, in its view, the judgment of conviction would not be affected, while, in the same breath, it insists that section 134 of that Act is unavailable to petitioner. Obviously, the requirement for Senate authorization in the latter case, that affecting the competence of Senator Eastland to sit while the Senate was in session, serves no less the protection of the committee witness than the requirement in the former case, that affecting the competence of Senator Eastland to sit in executive session. We submit that both provisions of the Legislative Reorganization Act were equally binding and

that the Subcommittee's failure to comply fatally impaired its authority to sit at all, during either of the sessions when petitioner appeared.

Consequently, the conviction of petitioner must be reversed.

VII.

The indictment was invalid because a majority of the Grand Jurors were Federal Government Employees.

Petitioner was indicted on November 26, 1956, by a grand jury in the District of Columbia, a majority of whose members were Federal Government employees. Petitioner moved to dismiss the indictment upon an affidavit affirmatively showing that, because of their fears by reason of the Federal loyalty and security programs, there was actual bias and prejudice on the part of such jurors. Alternatively, petitioner moved for a hearing at which he proposed to offer testimony to show such bias. These motions were denied.

The denial of those motions cannot be reconciled with the unquestioned right to an impartial grand jury. This right, implicit in the Fifth Amendment, has been expressly recognized by this Court. *Cassell* v. *Texas*, 339 U. S. 282, 298; *Pierre* v. *Louisiana*, 306 U. S. 354.

Contrary to popular opinion, the grand jury exercises the important function of protecting the citizen against unfounded accusation. "The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Costello* v. *United States*, 350 U. S. 359, 362. See the opinion of District Judge Weinfeld in *Application of United Electrical Radio & Machine Workers*, 111 F. Supp. 858 (S. D. N. Y.).

It is its duty to render a no bill unless probable cause exists to believe that a crime has been committed by the putative defendant. "[A] wrongful indictment inflicts a substantial harm on the indicted person * * *" *In re Fried,* 161 F. 2d 453, 465 (C. A. 2, per Frank, J.).

The very latitude which this Court has sanctioned in the evidence that may suffice for an indictment (*Costello* v. *United States,* 350 U. S. 359), makes it doubly imperative that no trace of partiality be found in the indicting body. Indeed, Mr. Justice Burton, concurring in that case, stated: "I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment" (350 U. S. at 364).

In *Frazier* v. *United States,* 335 U. S. 497, the Court, in a five to four decision, held that the mere fact that members of a jury were Government employees would not disqualify them, but that they could be challenged for actual bias. That case did not involve loyalty-security issues. In *Dennis* v. *United States,* 339 U. S. 162, this Court rejected the argument that the loyalty procedures of the Government during the several months preceding the trial there *ipso facto* created bias and fear in the minds of Government employees acting as jurymen in a case involving allegations of Communist Party membership. The Court held that actual bias had to be shown and said, "The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact" (339 U. S. at 168). In *Cammer* v. *United States,* 350 U. S. 399, however, when an attorney sought to investigate actual bias, he was convicted of contempt, and, although the conviction was reversed in this Court, his experiences hardly offer encouragement to counsel who would make a direct and private investigation of factual bias.

The only way which seems to remain to "raise a contention of bias from the realm of speculation to the realm

of fact" would seem to be the procedure which petitioner sought to follow in this case. If the District Court was right in denying petitioner's motion, the promise of this Court in *Dennis* is an empty one, and the fears expressed by the minority of the Court in *Frazier* are justified.

In what respects does this case differ from *Dennis*? The defendant in the *Dennis* case was directing his attack to the petit jury, but the considerations are of course the same. *Dennis*, however, was expressly decided on the ground that when the trial there was begun, the Government's loyalty program had been operative only three months (339 U. S. 162, 169). Under such circumstances, a majority of the Court was unwilling to take "judicial notice * * * of an aura of surveillance and intimidation which is said to exist in the District because of Executive Order 9835" (*Ibid.*). The Court took three facts into consideration in coming to this conclusion:

> (1) "the administrative implementation of Executive Order 9835 * * * was yet to come";
>
> (2) the individual jurors had explicitly denied that they would be influenced by the loyalty order; and
>
> (3) there was an "absence of any evidence which would indicate an opposite opinion among Government employees."

Before we point out that the instant case is distinguishable on all three points, a preliminary observation as to the views of the individual members of the Court seems appropriate, since *Dennis* has been consistently relied upon on this issue by the courts in the District of Columbia.

The opinion in *Dennis* written by Mr. Justice Minton was concurred in without qualification only by Chief Justice Vinson and Mr. Justice Burton. Mr. Justice Reed, while concurring, "reads the Court's opinion to mean that Gov-

ernment employees may be barred for *implied bias* when circumstances are properly brought to the court's attention which convince the Court that Government employees would not be suitable jurors in a particular case" (339 U. S. 162, 172-173).

While Mr. Justice Jackson concurred in the result in *Dennis*, he adhered "with increasing conviction" (339 U. S. 162, 173) to his dissent in *Frazier*. He was unwilling to give a special privilege to Dennis because he was a Communist.

Justices Black and Frankfurter wrote separate dissenting opinions. Justice Black said that "No juror can meet the test of 'impartiality' if he has good reason to fear that a vote for acquittal would subject him to harassing investigations and perhaps cost him his job" (339 U. S. 162, 175-176). Justice Frankfurter was of the opinion that the "pervasiveness of atmosphere in Washington" (339 U. S. 162, 182) even then, in 1947, was so great that government employees could not freely sit in judgment in "prosecutions inherently touching the security of the Government, at a time when public feeling on these matters is notoriously running high" (339 U. S. 162, 183).

While we urge upon this Court, without reservation, the views of Mr. Justices Black and Frankfurter, it is significant that the instant case is clearly distinguishable from that discussed in Mr. Justice Minton's opinion in *Dennis*:

> (1) In 1956, when petitioner here was indicted, the Federal Government's security and loyalty programs had been in effect nine long years rather than a mere three months. Everything that Mr. Justice Frankfurter suggested had become geometrically worse in the years between the date of his opinion, March 27, 1950, and the date of the indictment in this case, November 26, 1956. A recitation of the impact of the loyalty-security program upon government employees would literally take volumes. We deem it

sufficient to call this Court's attention to Association of the Bar of the City of New York, *Special Committee on the Federal Loyalty-Security Program* (1956); Brown, *Loyalty and Security; Employment Tests in the United States* (Yale Law School Lectures, 3) (1958); Bureau of National Affiairs, *Government Security and Loyalty; A Manual of Laws, Regulations, and Procedures* (1955); Shils, *The Torment of Secrecy; the Background and Consequence of American Security Policies* (1956); Commission on Government Security, Report Pursuant to Public Law 304, 84th Cong. as amended (1957); Watts, *The Draftee and Internal Security* (1955); Yarmolinsky, *Case Studies in Personnel Security* (1955).

(2) Since grand jurors, as well as petit jurors, were challenged in the instant case, there was no denial, as in *Dennis,* of bias; although we must state that we would regard such denial as unpersuasive for the reasons set forth in Justice Frankfurter's dissent in *Dennis.*

(3) Finally, it cannot be said that petitioner is disqualified for absence of evidence of fear among government employees. He attempted to establish such fear by his request for a hearing; he obviously cannot be penalized for the very error of the District Court to which he took explicit exception. This Court today can take judicial notice of the impact of nine years of the longest and most pervasive loyalty-security program in Anglo-American history.

Under these circumstances, we submit that the indictment should have been dismissed or, at the least, a preliminary hearing conducted on the effect of the loyalty-security program with the decision as the motion to abide the event.

In either case, the conviction must be reversed because of a fundamental and prejudicial error in the trial proceedings.

Virtually all of the considerations discussed above apply to the petit jury issue. Petitioner was convicted by a jury which included Government employees. He made an appropriate motion to disqualify them for cause (R. 10). Therefore the conviction must be reversed.

VIII.

The issue as to pertinency should have been submitted to the jury.

As we have indicated the Government at the trial adduced oral testimony on the issue of the pertinency of the indictment questions to the subject purportedly under inquiry by the Subcommittee at the time of petitioner's appearance. (See, *e.g.*, R. 75, 76, 77, 78, 79, 80, 81, 97-98 99). Notwithstanding petitioner's objections, the trial court refused to permit the jury to hear the testimony relating to this issue, refused to submit it to the jury, and reserved the issue for the court, ultimately determining it against petitioner (R. 53-54, 132). In doing so, we submit that the court erred and deprived petitioner of the trial by jury to which he was entitled.

Since the court did not grant petitioner's motion for acquittal at the end of the Government's case, the issue of pertinency was for the jury, since "all the elements of the crime charged shall be proved beyond a reasonable doubt". *Christoffel* v. *United States, supra,* 338 U. S. 89. The jury must determine all factual issues upon which there is any evidence though the evidence may be uncontroverted. *Hodges* v. *Easton,* 106 U. S. 408; *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 18, n. 10; *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 408; *Ex parte Milligan,* 4 Wall. (71 U. S.) 2.

We are aware that in *Braden* v. *United States*, 365 U. S. 431, 81 S. Ct. 584, 588, this Court, relying on *Sinclair* v. *United States*, 279 U. S. 263, 299, held that it is "proper for the court to determine the question [of pertinency] as a matter of law." We respectfully suggest, however, that the application of the *Sinclair* rule to a case such as the instant one is misplaced. *Sinclair* did not involve a situation where, as in the present case, "evidence *aliunde* was introduced to prove pertinency" (*United States* v. *Orman*, 207, F. 2d 148, 156 (C. A. 3)). In such a situation, the issue of pertinency becomes one of fact and its withdrawal from the jury is *pro tanto* a curtailment of the defendant's right to a trial by jury.

CONCLUSION

For the foregoing reasons, the judgment of conviction in this case should be reversed.

Respectfully submitted,

HARRY I. RAND,
1501 Broadway,
New York 36, N. Y.
LEONARD B. BOUDIN,
25 Broad Street,
New York 4, N. Y.

Attorneys for Petitioner.

October, 1961

APPENDIX

(Statutory Provisions Involved)

2 U. S. C. 192 (R. S. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) reads, as follows:

> "Refusal of witness to testify
>
> "Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers, upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

2 U. S. C. 190a (Legislative Reorganization Act of 1946, August 2, 1946, c. 753, Title I, § 133, 60 Stat. 831) reads, in pertinent part, as follows:

> "Committee meetings, hearings, records and reports
>
> • • •
>
> "(f) All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session."

2 U. S. C. 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753 Title I, § 134 (a), (c), 60 Stat. 831, 832) reads, in pertinent part, as follows

> "Authority of Senate standing committees and subcommittees; sitting while Senate or House in session
>
> • • •

"(b) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

(Senate Resolution Involved)

Senate Resolution 366, 81st Cong. 2d Sess., reads as follows:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"RESOLVED, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal

security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

No. 11

In the Supreme Court of the United States

OCTOBER TERM, 1961

HERMAN LIVERIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

ARCHIBALD COX,
Solicitor General,
J. WALTER YEAGLEY,
Assistant Attorney General,
BEATRICE T. REHER,
Assistant to the Solicitor General,
KEVIN T. MADDEN,
O'LEE B. ANDERSON,
Attorneys,
Department of Justice, Washington, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes and resolution involved	3
Statement	3
Summary of argument	11
Argument	19
I. The resolutions establishing and continuing the Senate Subcommittee on Internal Security authorized the Subcommittee to investigate Communist activities in the United States	19
A. The language of Senate Resolution 366 properly authorized the Subcommittee to investigate Communist activities	20
B. In any event, the legislative history of Senate Resolution 366 shows the authority of the Subcommittee to investigate Communist activities	25
II. Petitioner cannot claim for the first time at his trial that under the Legislative Reorganization Act of 1946 the Subcommittee could not properly hold the hearing at which he appeared. Moreover, that Act does not provide grounds on which to reverse his conviction	28
A. Petitioner failed to raise these issues at the hearing and therefore could not raise them at his trial	29
B. In any event, petitioner's contentions are without merit	32
III. The Subcommittee's investigation did not violate the First Amendment	34

818868—61——1

Argument—Continued
IV. The questions petitioner refused to answer were pertinent to the subjects under inquiry and this pertinency was made clear to petitioner by the Subcommittee ..... Page 35
A. Petitioner failed to challenge the pertinency of the questions when he appeared before the Subcommittee and therefore cannot claim at his trial that he was not apprised of their pertinency. In any event, he was apprised of their pertinency 36
B. The government proved that the questions were pertinent to the subjects under inquiry 44
V. Petitioner was not entitled to dismissal of the indictment or a hearing on the basis of broad allegations that government employees generally are biased 48
VI. The indictment was not required to specify the subjects under inquiry or the pertinency of the questions to these subjects, or to allege that petitioner's refusal to answer was wilful 49
VII. The trial court did not deprive petitioner of a fair trial by denying his motion to subpoena the Subcommittee's files and by refusing to allow him to secure the name of a confidential informant through cross-examination 51
Conclusion 58

CITATIONS

Cases:

Barenblatt v. *United States*, 360 U.S. 109 ..... 11, 12, 13, 15, 18, 19, 20, 25, 26, 28, 33, 36, 37, 38, 42, 43, 46, 47, 52, 54.
Barenblatt v. *United States*, 240 F. 2d 875, reversed, 354 U.S. 930 50
Braden v. *United States*, 365 U.S. 431 ..... 40, 41, 48
Chow Bing Kew v. *United States*, 248 F. 2d 466 51
Christoffel v. *United States*, 338 U.S. 84 30
Dennis v. *United States*, 339 U.S. 162 49
Deutch v. *United States*, 367 U.S. 456 ..... 36, 47

Cases—Continued — Page

Finn v. *United States*, 256 F. 2d 304 — 51
Glasser v. *United States*, 315 U.S. 60 — 57
Griffith v. *United States*, 230 F. 2d 607 — 51
Howenstine v. *United States*, 263 Fed. 1 — 51
Quinn v. *United States*, 349 U.S. 155 — 51
Reed v. *County Commissioners*, 277 U.S. 376 — 12, 23
Rumely v. *United States*, 293 Fed. 532 — 51
Sacher v. *United States*, 240 F. 2d 46, reversed, 354 U.S. 930 — 50, 55
Sacher v. *United States*, 252 F. 2d 828, reversed, 356 U.S. 576 — 22, 24, 50
Sinclair v. *United States*, 279 U.S. 263 — 48, 51
United States v. *Bryan*, 339 U.S. 323 — 13, 29, 30, 31
United States v. *Deutch*, 253 F. 2d 853 — 50
United States v. *Lamont*, 18 F.R.D. 27, affirmed, 236 F. 2d 312 — 50
United States v. *Peck*, 354 F. Supp. 603 — 28
Watkins v. *United States*, 354 U.S. 178 — 15, 21, 22, 24, 25, 28, 42, 43, 44, 46, 47
Wilkinson v. *United States*, 365 U.S. 399 — 40, 41, 54

Constitution, statutes, and rule:
United States Constitution:
First Amendment — 6, 14, 29, 34, 52, 53, 54
Fifth Amendment — 6
Internal Security Act of 1950, 64 Stat. 987 — 12, 22, 23, 24
Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, Title I — 3, 13, 14, 28, 30, 32, 33
Section 133(f) — 3, 33
Section 134(a) — 3, 32
Section 134(c) — 3, 32, 33
2 U.S.C. 192 (R.S. 102, as amended) — 3, 15, 17, 19, 30, 31, 43, 44, 46, 47, 51
Rule 7(c), Federal Rules of Criminal Procedure — 16, 50

Legislative materials:
Hearings, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate:
Communist Controls on Religious Activity, 86th Cong., 1st Sess. (1959) — 27

egislative materials—Continued
Hearings, Subcommittee to Investigate, Etc.—Con.
Communist Domination of Union Officials in Vital Defense Industry—International Union of Mine, Mill, and Smelter Workers, 82d Cong., 2d Sess. (1953) ..... Page 27
Communist Propaganda Activities in the United States, 82d Cong., 1st Sess. (1952) 27
Communist Tactics in Controlling Youth Organizations, 82d Cong., 1st and 2d Sess. (1951, 1952) .. 27
Communist Underground Printing Facilities and Illegal Propaganda, 83d Cong., 1st Sess. (1953) .. 27
Communist Use and Abuse of United States Passports, 85th Cong., 2d Sess. (1958) 26
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Protection of Defense Communications, 86th Cong., 2d Sess. (1960) 27
Scope of Soviet Activity in the United States (Labor), 85th Cong., 1st Sess. (1957), Parts 68, 77, 78, 80, 82, 88, 89 27
Subversive Control of the United Public Workers of America, 82d Cong., 1st Sess. (1951) 27
Subversive Infiltration of Radio, Television, and the Entertainment Industry, 82d Cong., 1st and 2d Sess. (1951, 1952) 27
Subversive Infiltration in the Telegraph Industry, 82d Cong., 1st and 2d Sess. (1951, 1952) 27
Subversive Influence in Certain Labor Organizations, 83d Cong., 1st and 2d Sess. (1953, 1954) .. 27
Subversive Influence in the Educational Process, 82d Cong., 2d Sess., and 83d Cong., 1st Sess. (1952, 1953) 27
Unauthorized Travel of Subversives Behind the Iron Curtain on United States Passports, 82d Cong., 1st Sess. (1951) 26–27
House of Representatives Rules, Rule XI 11, 20, 21, 22, 25, 28, 47

Legislative materials—Continued
Published Hearings and Reports of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 1951–1955 (Committee Print, 1957), Cumulative Index to ..... Page 26
S. Res. 366, 81st Cong., 2d Sess (1950) 3, 11, 12, 14, 19, 20, 21, 22, 23, 24, 25, 28, 32, 41, 46, 47
S. Res. 7, 82d Cong., 1st Sess. (1951) 27
S. Res. 198, 82d Cong., 1st Sess. (1951) 27
S. Res. 314, 82d Cong., 2d Sess. (1952) 27
S. Res. 5, 83d Cong., 1st Sess (1953) 21
S. Res. 46, 83d Cong., 1st Sess. (1953) 27
S. Res. 172, 83d Cong., 2d Sess. (1954) 27
S. Res. 49, 84th Cong., 1st Sess. (1955) 27
S. Res. 58, 84th Cong., 1st Sess. (1955) 27
S. Res. 174, 84th Cong., 2d Sess. (1956) 19, 27
S. Res. 209, 84th Cong., 2d Sess. (1956) 27
S. Res. 58, 85th Cong., 1st Sess. (1957) 27
S. Res. 233, 85th Cong., 2d Sess. (1958) 27
S. Res. 378, 85th Cong., 2d Sess. (1958) 27
S. Res. 59, 86th Cong., 1st Sess. (1959) 27
S. Res. 170, 86th Cong., 1st Sess. (1959) 27
S. Res. 242, 86th Cong., 2d Sess. (1960) 27
S. Res. 49, 87th Cong., 1st Sess. (1961) 28

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21–31) is reported at 280 F. 2d 708.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (Pet. App. 32). On July 13, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including August 17, 1960. The petition was filed on August 16, 1960, and certiorari was granted on June 19, 1961. 366 U.S. 960. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366 of the 81st Congress and Senate Resolution 174 of the 84th Congress authorized the Internal Security Subcommittee to conduct the hearing at which petitioner appeared.

2. Whether petitioner can claim for the first time at his trial that, under the Legislative Reorganization Act of 1946, the Subcommittee could not properly hold the hearing at which he appeared, and, if he can, whether that Act provides grounds upon which to reverse his conviction.

3. Whether the Subcommittee violated petitioner's rights under the First Amendment.

4. Whether petitioner raised the issue of pertinency before the Subcommittee and, if not, whether he can raise this issue for the first time at his trial.

5. Whether the questions petitioner refused to answer were pertinent to the subjects under inquiry.

6. Whether petitioner, who was indicted by a grand jury composed, in part, of federal employees, was entitled to dismissal of the indictment or a hearing on the basis of general allegations that such jurors were biased and afraid as a result of the government security program.

7. Whether the indictment was invalid because it failed to specify the subject under inquiry and the pertinency of the questions to that subject, and did not allege that petitioner's refusal to answer was wilful.

8. Whether the trial court deprived petitioner of a fair trial by denying his motion to subpoena the Subcommittee's files and by refusing to allow him to

secure the name of a confidential informant through cross-examination.

STATUTES AND RESOLUTION INVOLVED

Relevant portions of 2 U.S.C. 192, as amended; the Legislative Reorganization Act of (August 2) 1946, c. 753, Title I, Sections 133, 134, 60 Stat. 831–832 (2 U.S.C. 190a, 190b); and Senate Resolution 366, 81st Cong., 2d Sess., are set forth in petitioner's brief at pp. 49–51. In addition, Section 2 of the Resolution states:

> The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate * * * as it deems advisable.

STATEMENT

Petitioner was charged in a fifteen-count indictment in the District Court for the District of Columbia with having refused, in violation of 2 U.S.C. 192, to answer fifteen questions, pertinent to the matter under inquiry, put to him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 1–3). Upon a trial by jury, petitioner was found guilty on counts 1 through 14 (J.A. 134). Count 15 was dismissed (J.A. 126). Petitioner was sentenced by the district court to imprisonment for three months and to pay a fine of five hundred dollars (J.A. 12). The judgment of the trial court was affirmed by the court of appeals.

618868—61——2

The pertinent facts may be summarized as follows:

The counsel of the Subcommittee testified at petitioner's trial concerning the reason petitioner was subpoenaed to testify. He said that, at the time petitioner was subpoenaed, the Subcommittee had information that petitioner had been active in Communist activities in New York and subsequently had been transferred to New Orleans with orders to carry on Party activities there (J.A. 76–77); that petitioner moved to New Orleans for the purpose of becoming active in and ultimately taking over the direction of the professional branch, which was an underground operation of the Party (J.A. 78); that because of his work in television, and mass communications generally, the Communist Party felt that he was an important asset, and therefore wanted to use him to bolster their activities in New Orleans (J.A. 99); that secret Communist activities were held at one of the addresses in New Orleans where petitioner resided, 333 Ware Street (J.A. 75–81); that, after petitioner had gone to New Orleans, the Communist leadership cautioned petitioner to stay away from open Communist activities (J.A. 80–81); that petitioner and his wife had rented a post office box in White Plains, New York, under the name of the Westchester County Committee for Ethel and Julius Rosenberg, which was part of a fund-raising drive in behalf of two Communists who had been convicted and sentenced to death for violation of the Espionage Act (J.A. 79–80); that this committee was raising money for Communist purposes in addition to the purpose of collecting defense funds for the Rosenbergs (J.A.

79–81); that petitioner had been a Party member shortly before he appeared before the Subcommittee (J.A. 77); that petitioner had subscribed to Communist Party nominating petitions[1] (J.A. 75–76); that he had contributed money to the Communist Party (J.A. 79); and that he had been membership director of the Thomson-Hill Branch of the Party in 1943 (J.A. 76–77).

On the basis of this information, the Subcommittee decided to subpoena petitioner to appear before it on March 19, 1956. Prior to his appearance, petitioner's counsel, Philip Wittenberg, a New York attorney with experience in the field of civil liberties (J.A. 81–82), telephoned the Subcommittee counsel, Mr. Robert Morris, and asked what the inquiry was about and what questions would be asked petitioner. Mr. Wittenberg was informed in general terms by Mr. Morris concerning the subject matter of the inquiry, although Mr. Morris did not relate the specific evidence possessed by the Subcommittee (J.A. 67–71). Petitioner's attorney, according to Mr. Morris, did not raise any question concerning the Subcommittee's authority but "indicated that he knew the work of the Internal Security Subcommittee and what we were trying to do" (J.A. 69–70) and "then became specific when he said he knew what problems I would have on internal security" (J.A. 71).

Petitioner appeared with his counsel before the

[1] This information was a matter of public record (J.A. 101).

Subcommittee on March 19, 1956, first in executive session and then (following a recess) in a public session. At the executive session, petitioner initially disclosed his identity, occupation, and his address for the previous two years as 2239 General Taylor Street in New Orleans (J.A. 18). He denied, after consulting counsel, that Communists had been meeting at his home, but declined to state whether he was then an active Communist or whether he had been membership director of the Party's Thomson-Hill branch in 1943 (counts 1 and 2) (J.A. 19–20). Petitioner refused to answer these questions on the basis of a lengthy legal memorandum, which he submitted to the Subcommittee (J.A. 41–50). Petitioner's principal objection was that the Subcommittee was invading "my political beliefs, any other personal and private affairs, and my associational activities" protected by the First Amendment (J.A. 41–42). His remaining objections were based on separation of powers and the *ex post facto* and bill of attainder clauses of the Constitution (J.A. 44, 46–50). Petitioner expressly disclaimed any reliance on the Fifth Amendment (J.A. 20).

After petitioner's refusal to answer the two questions at the executive session, he was temporarily excused (J.A. 21). The Subcommittee then decided to take further testimony from petitioner in a public session, since it was hoped that this might lead petitioner to change his mind (J.A. 105–106). About an hour and fifteen minutes later, petitioner, with his counsel, was called before the Subcommittee in public

session. He was then advised by Mr. Morris (J.A. 21–22):

> Mr. Chairman, before commencing the interrogation of this particular witness, I would like to restate again for the record the purpose of the particular series of hearings being held by the Internal Security Subcommittee. I read now from the opening statement of the chairman:
>
> "We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures."
>
> "Under consideration during these hearings will be the activities of Soviet agents and agencies registered with the Department of Justice and such other agents or agencies not now registered whose activities may warrant legislative action."
>
> "We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and composition of our own Government here, as the facts bearing on these issues are gathered in the public record of this subcommittee which will enable it to make recommendations or determinations as to whether the Internal Security Act of 1950 and other existing law should be repealed, amended or revised, or new laws enacted."

> This witness is being called here this afternoon, Senator, in the course of that particular set or series of hearings.

Petitioner described his duties as television program director for a television station in New Orleans, as well as his previous employment in New York City and elsewhere (J.A. 22–32). The Subcommittee counsel, Mr. Morris, then stated (J.A. 32):

> Mr. Chairman, this committee has been informed that Mr. Liveright and his wife were active in the Communist Party of New York City, and that at the time and date they moved to the South, they were formally asked by their Communist Party associates to keep away from formal associations with the Communist Party at that time in their activities.
>
> * * * * *
>
> The purpose of subpoenaing this witness and asking him the following questions is to determine to what extent Mr. Liveright's activities have been carried out in New Orleans in the framework of the Communist Party and to what extent they have been carried out in some other framework.

Petitioner refused, even after being ordered by the Chairman, to answer whether he was then or had ever been a Communist (counts 3 and 4) (J.A. 32–33). His refusals were based on the written memorandum previously submitted to the Subcommittee—"on the grounds that, as it states in the objection, this is an inquiry into my political beliefs" (J.A. 32–33). Thereupon the Chairman explained to petitioner (J.A. 33):

> The question, Mr Liveright, is very pertinent. We are attempting to see what amend-

ments are needed to the Internal Security Act. In addition, and as a part of that, we are tracing the activities of the Communist Party in this United States.

Our information is, sir, that you were sent South and placed there with your wife on a mission for the Communist Party, and were told by your superiors not to become involved with a Communist cell that was a professional group in the city of New Orleans, but the word was used by your superiors to stay clean.

Now, is that true? Were you sent on a mission for the Communist Party into the South? [Count 5]

After consultation with counsel, petitioner stood "on the objection that I have already submitted," but added "that the information which you have, the purport of the information you have asked me about, is completely erroneous" (J.A. 33). Petitioner refused to explain what he meant, and after being directed by the Chairman to answer, persisted in his refusal to answer the question on the basis of his previously submitted objection (J.A. 34).

Upon being asked the questions forming the basis of counts 6, 7, and 8—whether he had been "affiliated with a Communist cell in the city of New Orleans, composed of professional people"; whether Communist meetings had been held in his home at 333 Ware Street in New Orleans; and whether he had been "at one time membership director of the Thomson-Hill branch of the Communist Party"—petitioner refused to answer on the basis of his previous objection (J.A. 34). He persisted in his refusals after being given

separate directions to answer by the Chairman (J.A. 34–35).

The Chairman then pointed out (J.A. 36):

> Mr. Liveright, the Communist movement, with which we have information that you are affiliated, sir, in a conspiracy against your country. It is a conspiracy which seeks to overthrow your country. We have information, sir, and we desire to know how this conspiracy is financed, that you have given money to the Communist Party on various occasions. State whether that is true or untrue. [Count 9]

Petitioner refused to answer the question "on the same grounds," and persisted in his refusal after the Chairman directed him to answer the question (J.A. 36). The Chairman stated that petitioner had "the opportunity now to help [his] country by just frankly answering the questions and telling us the truth, to enable us * * * to draft legislation to protect the welfare and the safety of our country" (J.A. 36–37).

Petitioner refused on personal grounds to answer "did you and your wife rent a post-office box in White Plains, N.Y." (count 10) (J.A. 37). He refused on the grounds given in his statement and because "I do not feel * * * that answering questions which probe my personal life as being of any help to society or my country or anybody else * * *" (J.A. 37–38).

Petitioner then refused to answer whether he had attempted to "rent a post-office box in White Plains, N.Y., under the name of the Westchester County Committee for Ethel and Julius Rosenberg" (count 11), whether he had sent his children away from his

"home, in order to have a meeting in your home of a Communist cell, and you did not want your children to see the people in the city of New Orleans who belonged to this cell" (count 12); when he joined the Communist Party (count 13); and whether he was told by "the Communist leadership in New York after you affiliated, to stay clean in New Orleans" (count 14) (J.A. 38–40). He gave as his basis for refusal the objection which he had previously submitted.

SUMMARY OF ARGUMENT

I

The resolution establishing the Senate Subcommittee on Internal Security is sufficiently clear, at least together with its legislative history, to authorize the Subcommittee to investigate Communist activities.

A. In *Barenblatt* v. *United States,* 360 U.S. 109, this Court, although holding that Rule XI of the House of Representatives, together with its legislative history, authorized the Un-American Activities Committee to investigate Communist activities, indicated that the rule in itself was too vague to confer this authority. The language of Senate Resolution 366, however, which is the Subcommittee's authorizing resolution, is considerably clearer. Clauses (1) and (2) of the resolution specifically authorize the Subcommittee to investigate the "administration, operation, and enforcement of" the Internal Security Act of 1950 and other internal security laws. The only possible vagueness in clause (3), which most nearly corresponds to Rule XI, is its use of the phrase "subversive activities." However, this term is limited

by its context: it follows immediately after the reference in clause (1) to the Internal Security Act of 1950, which describes subversive activities in considerable detail, and it is followed by the limiting phrase, "including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." This Court has held that in Congressional resolutions "[t]he meaning of the general language employed is to be confined to acts belonging to the same general class as those specifically authorized." *Reed* v. *County Commissioners*, 277 U.S. 376, 389.

Since the strict standards of definiteness applicable to criminal statutes are inapplicable to resolutions establishing Congressional committees, and since the resolution here in issue compares favorably from the standpoint of definiteness with resolutions establishing other Congressional committees, the language of Senate Resolution 366 is in itself sufficiently clear to authorize this investigation.

B. In any event, even if the language of Senate Resolution 366 is not sufficiently clear, on its face, to authorize the Subcommittee to investigate Communist activities, this Court in *Barenblatt* held that the authority granted by a Congressional resolution could be ascertained by examining its legislative history. Just as the House Committee on Un-American Activities, the Senate, well aware of the Subcommittee's repeated investigation of various aspects of

Communist activities, has steadily continued this Subcommittee and supported its activities with substantial appropriations. Thus, as in *Barenblatt*, the "'persuasive gloss of legislative history' * * * shows beyond doubt" that the Senate gave the Subcommittee "pervasive authority to investigate Communist activities in this country" (360 U.S. at 118).

II

A. Petitioner claimed for the first time at his trial that, under the Legislative Reorganization Act of 1946, the Subcommittee could not properly hold the hearing at which he appeared, since the Subcommittee had not received permission of the Senate to hold a hearing while the Senate was in session and the executive session had not been authorized by the parent Judiciary Committee. These contentions, however, are not available to petitioner for objections to the procedures followed by a Congressional committee must be raised before the committee. *E.g., United States* v. *Bryan*, 339 U.S. 323, 333; *Barenblatt* v. *United States*, *supra*, 360 U.S. at 123–124. If petitioner had made these objections to the Subcommittee, it could easily have met them by obtaining leave to hold the hearing from the Senate while it was in session or by simply holding the hearing when the Senate was not in session, and by either having the Judiciary Committee authorize the executive session or repeating the questions which petitioner refused to answer during the executive session at a public session.

B. Even if petitioner had made his objections be-

fore the Subcommittee, they would be without merit. The requirement in the Legislative Reorganization Act that committees obtain permission from the House or Senate to hold hearings while they are in session was enacted to assist Congress in securing the attendance of its members, not to confer rights on witnesses. Moreover, Senate Resolution 366, which was passed subsequent to the Legislative Reorganization Act of 1946, specifically authorizes the Subcommittee "to sit and act * * * during the sessions * * * of the Senate * * *."

While the executive session was apparently not authorized by the Judiciary Committee as the Legislative Reorganization Act requires, it is doubtful that the Act confers on witnesses the right to refuse to answer because such permission has not been obtained. In any event, only two of the counts involve questions asked at the executive session; the other twelve counts arose from questions asked at a public session. Since petitioner was given a general sentence which was less than he could have received on any one count, his conviction must be affirmed if any count is valid.

III

For the same reasons stated in our brief in *Shelton* v. *United States*, No. 9, this Term, pp. 48–49, the Subcommittee's investigation did not violate the First Amendment.

IV

Petitioner cannot excuse his refusal to answer by the alleged lack of pertinency of the questions.

A. Petitioner made no objection before the Subcommittee to the pertinency of the questions. Therefore, as we have shown in our brief in *Shelton, supra,* pp. 25–29, he cannot claim that the Subcommittee failed to apprise him of the subjects under inquiry or the pertinency of the questions to that subject.

Moreover, petitioner was clearly apprised by the Subcommittee of the subjects under inquiry: the organization of the Communist Party, its activities in the United States generally, and, in particular, the Party's activities in the South. The pertinency to these subjects of twelve out of the fourteen questions involved here—which included whether petitioner was then or had ever been a Party member—was clear on their face.

Petitioner claims that the Subcommittee's only subject under inquiry was Communist activity generally and that this subject is too broad to constitute a proper subject under inquiry for the purposes of 2 U.S.C. 192. Aside from the fact that the Subcommittee actually narrowed its particular subject under inquiry to Communist activities in the South, this Court in *Watkins* v. *United States,* 354 U.S. 178, and *Barenblatt* did not lay down any substantive rule that Congressional committees must confine their investigations to narrowly defined topics. Rather, it held only that a committee, on request of the witness, must state clearly what the subject under inquiry is.

B. The government proved, as 2 U.S.C. 192 requires, that the questions petitioner refused to answer were pertinent to the subjects under inquiry. By introducing the transcript of the hearings, the

government established the three subjects under inquiry described above. As we have noted, twelve of the fourteen questions were on their face pertinent to these subjects. The government showed, through oral testimony, that the other two questions were also pertinent.

V

Petitioner claims that he was entitled to dismissal of the indictment or at least a hearing because of the bias of government employees who were on the grand jury. As we have shown in our brief in *Shelton, supra*, pp. 62–76, a defendant cannot challenge an indictment because of the bias of grand jurors unless he can show specific and convincing evidence of strong bias in individual grand jurors. Here, as in *Shelton*, petitioner made no allegations with respect to individual grand jurors and did not even state any specific facts showing bias among government employees generally.

VI

Petitioner contends that the indictment was required to specify the subjects under inquiry and the pertinency of the questions to those subjects, and to allege that petitioner's refusal to answer was wilful. As shown in our brief in *Shelton, supra*, pp. 78–83, under Rule 7(c) of the Federal Rules of Criminal Procedure and the decisions of this Court and the courts of appeals, an indictment need not specify the subject under inquiry. For the same reasons, it need not provide the reasoning underlying the allegation that the questions were pertinent.

Where, as here, wilfulness is an element of the case, it cannot be ignored in an indictment. It can, however, be alleged either in terms or in words of similar import. The allegation here that petitioner "unlawfully" refused to answer is sufficient to allege that the refusal was wilful in the sense of deliberate and intentional. This Court has held that such a refusal violates 2 U.S.C. 192. *Quinn* v. *United States*, 349 U.S. 155, 165.

VII

Petitioner was not deprived of a fair trial by the trial court's denial of his motion to subpoena the Subcommittee's files and its refusal to allow him to ask certain questions on cross-examination of the Subcommittee counsel concerning the information on the basis of which the Subcommittee subpoenaed petitioner. It is clear that petitioner was seeking to obtain confidential information and the identity of confidential informants which he was not permitted to have.

A. The reason petitioner gave the trial court for subpoenaing the Subcommittee's files was to show that it already had all the information it sought from petitioner and therefore that subpoenaing petitioner had no legislative purpose. But even if petitioner could have shown that the Subcommittee had all the information petitioner could give—which seems impossible, for it is impossible to know what questions the Subcommittee would have asked if petitioner had cooperated or what he would have answered—the Subcommittee still could properly confirm the information

it already had. Petitioner now claims, however, that he needed to have the files to show that the Subcommittee had no basis to subpoena him. This contradicts his earlier claim that the Subcommittee already had all the information it sought to obtain from him.

In any event, we submit that a witness who refuses to answer questions asked by a Congressional committee is not entitled to the disclosure of the confidential files of the committee before he can be punished for contempt. If Congressional committees were required to disclose confidential information in order to enforce their directions to witnesses, the result would be to interfere seriously with Congressional investigations. While this Court indicated in *Barenblatt* that witnesses could not be called unless the committee had reasonable basis for believing that they had information of value in the investigation, it did not suggest that the sufficiency of the committee's information and reasons for subpoenaing a witness would be subject to plenary judicial review. We submit that the Court intended, at most, to require only that Congressional committees present information showing some reasonable basis for their decision to subpoena a witness.

B. Petitioner sought on cross-examination of the Subcommittee counsel to obtain the name of a confidential informant in order to show that the Subcommittee had no probable cause to subpoena petitioner. Trial courts have, of course, broad discretion over the scope of cross-examination. For the same reasons that the trial court refused to grant petitioner's motion to subpoena the Subcommittee's files, the court properly

exercised its discretion in refusing to allow cross-examination in this narrow area.

ARGUMENT

Petitioner was convicted of contempt of Congress for refusing to answer fourteen questions asked him by a Congressional committee concerning his activities in the Communist Party. Since petitioner was given a general sentence and a fine on all fourteen counts which was less than the maximum authorized by 2 U.S.C. 192 under any one count, the judgment below must be affirmed if any one of the counts is upheld. *E.g., Barenblatt* v. *United States*, 360 U.S. 109, 115. We submit, however, that petitioner was properly convicted on each of the fourteen counts.

I

THE RESOLUTIONS ESTABLISHING AND CONTINUING THE SENATE SUBCOMMITTEE ON INTERNAL SECURITY AUTHORIZED THE SUBCOMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES IN THE UNITED STATES

Petitioner erroneously contends (Pet. Br. 34) that the enabling resolution of the Subcommittee is so vague that the Subcommittee is without constitutional power to compel testimony from petitioner. The Senate authorized the creation of the Internal Security Subcommittee in 1950 by passage of Senate Resolution 366, 81st Cong., 2d Sess. This resolution, which has been readopted in subsequent sessions,[1] authorized the Committee on the Judiciary or any duly authorized subcommittee thereof to make a complete and continuing study and investigation of:

[1] Senate Resolution 174, 84th Cong., 2d Sess. was operative when petitioner testified.

> (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

We submit (1) that the language of this resolution is sufficiently clear to authorize the Internal Security Subcommittee to investigate Communist activities in the United States and (2) even if the language is considered too vague to establish this authority alone, the history of the resolution demonstrates that Congress conferred this authority on the Subcommittee. Since, as we will show (pp. 37–41), the Subcommittee was investigating the organization of the Communist Party, Communist activities in the United States generally, and, more particularly, Communist activities in the South, this particular investigation was well within the Subcommittee's authority.

A. THE LANGUAGE OF SENATE RESOLUTION 366 PROPERLY AUTHORIZED THE SUBCOMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES

In *Barenblatt* v. *United States*, 360 U.S. 109, this Court, although holding that Rule XI of the House of Representatives, together with its legislative his-

tory, authorized the Un-American Activities Committee to investigate Communist activities (*id.* at 117–123), indicated that the rule in itself was too vague to confer this authority. *Id.* at 117; see also *Watkins* v. *United States*, 354 U.S. 178, 201–202. Rule XI authorizes the Un-American Activities Committee to make investigations of (H. Res. 5, 83d Cong., 1st Sess.):

> (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

We believe that the language of Senate Resolution 366 is considerably clearer than Rule XI and therefore conferred sufficient authority on the Subcommittee to investigate various aspects of Communist activities.

Clauses (1) and (2) of Senate Resolution 366 authorize the Subcommittee to make a "complete and continuing study and investigation" of the "administration, operation, and enforcement of," respectively, "the Internal Security Act of 1950" and "other laws relating to espionage, sabotage, and the protection of the internal security of the United States." The area of the Subcommittee's investigative authority thus delineated is sufficiently definite to serve as a valid

Congressional resolution, and petitioner does not seriously dispute the point (see Pet. Br. 35). "Bare recital of this portion of the resolution," as the court below observed in *Sacher* v. *United States*, 252 F. 2d 828, 832 (C.A. D.C.), reversed on other grounds, 356 U.S. 576, "discloses that it is not subject to the same criticism as was directed at the House Resolution under which Watkins was questioned. It sufficiently describes 'the kind of investigation that the committee was directed to make.'"

Clause (3), which is the only clause whose language petitioner specifically attacks (Pet. Br. 35), is the portion of Senate Resolution 366 which most nearly corresponds to House Rule XI. But Senate Resolution 366 does not include either the term "un-American" or the phrase "principle of the form of government as guaranteed by our Constitution"—whose indefiniteness this Court alluded to in *Watkins* (354 U.S. at 202). The only real point of similarity between Rule XI and this clause of Senate Resolution 366 is the use in each of the word "subversive." The setting and context in which the phrase "subversive activities" is used in clause (3), however, give it a more defined and specific content than the term "subversive * * * propaganda" has on the face of House Rule XI. First, the phrase "subversive activities" in clause (3) comes immediately after the reference in clause (1) to the "Internal Security Act of 1950"—the first Title of which is denominated the "Subversive Activities Control Act of 1950" (Section 1(a), 64 Stat. 987) and which describes in consider-

able detail the subversive activities with which Congress was concerned (Section 2, 64 Stat. 987).

Second, the term "subversive activities" is qualified in clause (3) by the phrase, "including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of "the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence." The effect of the words "including, but not limited to" does not appreciably expand the concept of "subversive activities" beyond the confines of the specific subjects itemized following that phrase. For this Court has held that in Congressional resolutions "[t]he meaning of the general language employed is to be confined to acts belonging to the same general class as those specifically authorized." *Reed* v. *County Commissioners,* 277 U.S. 376, 389. Applying this principle to the third clause of Senate Resolution 366, the meaning of the phrase "subversive activities" is confined to activities at least of the "same general class" as "espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."[8] These words and phrases have been

[8] Thus, there is no merit to the claim of the petitioner in *Price* v. *United States*, No. 12, this Term (Pet. Br. in No. 12, p. 36) that "the Senate has expressly provided that the 'subversive activities' to be investigated are *not* limited to 'movements seeking to overthrow, the Government of the United States by force and violence'" (emphasis in original).

used and their meaning described in numerous federal statutes (including the detailed legislative findings concerning the world Communist movement in Section 2 of the Internal Security Act). For this reason, and because authorizing resolutions for legislative investigations have never been considered to require the narrow, defined language of a criminal statute (see *infra*, pp. 24–25), there is no basis, we believe, for holding that the third clause of Senate Resolution 366 is invalid.[4]

In any event, even if it be assumed, *arguendo*, that the term "subversive activities" in the third clause of Senate Resolution 366 is lacking in the specificity desirable in an enabling resolution, the clarity and specificity of the remainder of the resolution leave no real doubt (as *Sacher* v. *United States*, *supra*, 252 F. 2d at 831–832, pointed out) of the area of authority conferred by that resolution on the Subcommittee.

The strict standards of definiteness applicable to criminal statutes, it is to be remembered, have never been thought applicable to resolutions establishing Congressional committees and defining their powers. The demarcation of the areas of authority of such committees is in the nature of things required to be stated in general terms. If the resolution establishing

[4] In *Watkins*, this Court referred to the expression "subversion and subversive propaganda" (as orally used by the Chairman of the Subcommittee of the Committee on Un-American Activities in announcing the subject of an investigation) as "at least as broad and indefinite as the authorizing resolution of the Committee, if not more so" (354 U.S. at 214). But this phrase, unlike the phrase "subversive activities" in the authorizing resolution in the case at bar, lacked a contextual setting clothing it with meaning and content.

the Senate Internal Security Subcommittee is fatally indefinite, then so, it would seem, are the authorizing resolutions—which are cast in equally if not more indefinite terms—of the Senate Committees on the Armed Services, Interstate and Foreign Commerce, and Appropriations, as well as the resolutions creating numerous select and special committees which have been established by Congress from time to time. See the dissenting opinion of Mr. Justice Clark in *Watkins*, 354 U.S. at 220–222. "Yet no one", as Mr. Justice Clark noted, "has suggested that the powers granted [these other committees] were too broad" (*id.* at 222).

B. IN ANY EVENT, THE LEGISLATIVE HISTORY OF SENATE RESOLUTION 366 SHOWS THE AUTHORITY OF THE SUBCOMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES

It was necessary in *Barenblatt* to examine the legislative gloss of House Rule XI only because the Court "grant[ed] the vagueness of the Rule" (360 U.S. at 117). The more precise words of the Senate Resolution 366, we have shown, make it unnecessary to make such an examination here. But, if the language of Senate Resolution 366 is not clear enough in itself to give the Subcommittee the authority to investigate Communist activities, the " 'persuasive gloss of legislative history' * * * shows beyond doubt," just as in *Barenblatt*, that the Senate gave the Subcommittee "pervasive authority to investigate Communist activities in this country" (360 U.S. at 118).

In finding in *Barenblatt* that the gloss of legislative history clearly showed that the House of Representatives had given the Un-American Activities Committee authority to investigate Communist activities, the Court looked to two kinds of evidence. First, it found

that "the Committee has devoted a major part of its energies to the investigation of Communist activities" and conducted investigations of such activities in numerous fields of American life (360 U.S. at 118–119). And, second, the Court found that "the House has steadily continued the life of the Committee at the commencement of each new Congress; it has never narrowed the powers of the Committee * * *; and it has continuingly supported the Committee's activities with substantial appropriations" (360 U.S. at 119–120).

The same evidence can easily be mustered to show that the Senate has given the Internal Security Subcommittee pervasive authority to investigate Communist activities. To begin with, the Subcommittee has always devoted most of its energies to investigating Communist activities.[5] Since its inception, the Subcommittee has conducted investigations into such alleged Communist activities as espionage, misuse of passports, propaganda, and infiltration into labor, religion, defense, industry, education, youth organizations, and the government.[6]

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[5] See Cumulative Index to Published Hearings and Reports of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 1951–1955 (Committee Print, 1957). See also the hearings and reports cited in note 6, *infra*.

[6] Hearings, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate: *Espionage Activities of Personnel Attached to Embassies and Consulates under Soviet Domination in the United States*, 82d Cong., 1st and 2d Sess. (1951, 1952); *Communist Use and Abuse of United States Passports*, 85th Cong., 2d Sess. (1958); *Unauthorized*

Moreover, the Senate has continued the life of the Subcommittee at each new Congress. S. Res. 7, 82d Cong., 1st Sess. (1951); S. Res. 198, 82d Cong., 1st Sess. (1951); S. Res. 314, 82d Cong., 2d Sess. (1952); S. Res. 46, 83d Cong., 1st Sess. (1953); S. Res. 172, 83d Cong., 2d Sess. (1954); S. Res. 49, 84th Cong., 1st Sess. (1955); S. Res. 58, 84th Cong., 1st Sess. (1955); S. Res. 209, 84th Cong., 2d Sess. (1956); S. Res. 174, 84th Cong., 2d Sess. (1956); S. Res. 58, 85th Cong., 1st Sess. (1957); S. Res. 233, 85th Cong., 2d Sess. (1958); S. Res. 378, 85th Cong., 2d Sess. (1958); S. Res. 59, 86th Cong., 1st Sess. (1959); S. Res. 170, 86th Cong., 1st Sess. (1959); S. Res. 242, 86th Cong., 2d Sess. (1960); S. Res. 49, 87th Cong.,

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Travel of Subversives Behind the Iron Curtain on United States Passports, 82d Cong., 1st Sess. (1951); *Communist Underground Printing Facilities and Illegal Propaganda*, 83d Cong., 1st Sess. (1953); *Communist Propaganda Activities in the United States*, 82d Cong., 1st Sess. (1952); *Scope of Soviet Activity in the United States (Labor)*, 85th Cong., 1st Sess. (1957), Parts 68, 77, 78, 80, 82, 88, 89; *Subversive Influence in Certain Labor Organizations*, 83d Cong., 1st and 2d Sess. (1953, 1954); *Communist Domination of Union Officials in Vital Defense Industry—International Union of Mine, Mill, and Smelter Workers*, 82d Cong., 2d Sess. (1952); *Subversive Control of the United Public Workers of America*, 82d Cong., 1st Sess. (1951); *Communist Controls on Religious Activity*, 86th Cong., 1st Sess. (1959); *Protection of Defense Communications*, 86th Cong., 2d Sess. (1960); *Subversive Infiltration in the Telegraph Industry*, 82d Cong., 1st and 2d Sess. (1951, 1952); *Subversive Infiltration of Radio, Television, and the Entertainment Industry*, 82d Cong., 1st and 2d Sess. (1951, 1952); *Subversive Influence in the Educational Process*, 82d Cong., 2d Sess., and 83d Cong., 1st Sess. (1952, 1953); *Communist Tactics in Controlling Youth Organizations*, 82d Cong., 1st and 2d Sess. (1951, 1952); *Interlocking Subversion in Government Departments*, 83d Cong., 1st Sess. (1953).

1st Sess. (1961). The authority of the Subcommittee has never been narrowed since its inception in 1950. And Congress has continually supported the Subcommittee's activities with substantial appropriations. See the resolutions cited above.[1]

II

PETITIONER CANNOT CLAIM FOR THE FIRST TIME AT HIS TRIAL THAT UNDER THE LEGISLATIVE REORGANIZATION ACT OF 1946 THE SUBCOMMITTEE COULD NOT PROPERLY HOLD THE HEARING AT WHICH HE APPEARED. MOREOVER, THAT ACT DOES NOT PROVIDE GROUNDS ON WHICH TO REVERSE HIS CONVICTION

Petitioner asserts (Pet. Br. 35–42) that his conviction should be reversed on the ground that the Subcommittee, when he appeared before it, was not a competent tribunal because the Legislative Reorganization Act of 1946 (see Pet. Br. 49–50) provides (1) that "[n]o standing committee of the Senate • • • shall sit, without special leave, while the Senate • • • is in session," and (2) that all hearings conducted by Senate committees "shall be open to the public, except executive sessions for marking up bills or for

[1] Petitioner in *Price* v. *United States*, *supra*, relies (Pet. Br. in No. 12, p. 35) on *United States* v. *Peck*, 354 F. Supp. 603, 608–610 (D. D.C.), which held that Senate Resolution 366 was too indefinite to support an investigation similar to that involved here. But that case, which was decided before *Barenblatt*, construed this Court's decision in *Watkins* to invalidate House Rule XI's authorization of the House Un-American Activities Committee and held that Senate Resolution 366 was no more clear. In *Barenblatt*, however, this Court held that House Rule XI authorized the Un-American Activities Committee to investigate Communist activities. Therefore, the premise on which the *Peck* decision was based no longer exists.

voting or where the committee by a majority vote orders an executive session." These contentions are without merit.

A. PETITIONER FAILED TO RAISE THESE ISSUES AT THE HEARING AND THEREFORE COULD NOT RAISE THEM AT HIS TRIAL

First, we submit that these contentions are not available to petitioner because he made no objection on either ground at the time he appeared before the Subcommittee. Instead, his lengthy statement of legal argument and authorities (J.A. 41–50) relied entirely on various constitutional privileges—the First Amendment, separation of powers, and the *ex post facto* and bill of attainder clauses (see *supra*, p. 6).

It is well established that a witness before a Congressional committee is not entitled to raise objections at his trial, concerning the procedures followed by the committee, which he has not raised before the committee itself. See the discussion in our brief in *Shelton* v. *United States*, No. 9, this Term, at pp. 25–29. Applying this principle to the instant case, it is apparent that the Subcommittee could have easily met petitioner's objections if they had been made to it—by obtaining leave to hold the hearing while the Senate was in session or by holding the hearing when the Senate was not in session, and by either having the Judiciary Committee authorize the executive session by majority vote or repeating the questions which petitioner refused to answer during the executive session at a public session. In these circumstances, as the Court said in *United States* v. *Bryan*, 339 U.S. 323, 333: "To deny the Committee the opportunity

to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes."

Petitioner suggests (Pet. Br. 38–39) three grounds for his contention that it was not necessary to raise these issues before the Subcommittee. First, he cites *Christoffel* v. *United States*, 338 U.S. 84, 88, for the proposition that "[i]n a criminal case affecting the rights of one not a member [of the Committee], the occasion of trial is an appropriate one for petitioner to raise the question." The question involved in *Christoffel*, however, was whether a perjury conviction should be reversed on the ground of the lack of a quorum. The lack of a quorum involves a far more basic issue than whether a hearing has been held while the Senate was in session without the Senate's permission or whether an executive session has been held by a subcommittee without the parent committee's permission. It can perhaps be said that unless a quorum is present a hearing is being held by individual Congressmen, not by a Congressional committee. Certainly, it cannot be suggested—assuming that the Subcommittee here violated the Legislative Reorganization Act—that it was not acting as a committee of the Senate. Furthermore, this Court in the *Bryan* case (which also involved the issue of a quorum) distinguished *Christoffel* on the ground that the latter involved a conviction under a statute which expressly punished only perjury before a "competent tribunal" (339 U.S. at 329). In contrast, the Court emphasized in *Bryan*, the contempt-of-Congress statute (R.S. 102) has no such requirement (*ibid.*): "It does not contemplate some affirmative act which is made punishable only if

performed before a competent tribunal, but an intentional failure to testify or produce papers, however the contumacy is manifested." Petitioner here was punished under 2 U.S.C. 192, which is the successor statute to R.S. 102, and which likewise punishes any intentional failure to testify.

Petitioner next contends that the *Bryan* case distinguished the situation where a witness refuses to give oral testimony rather than to produce documents. It is true that the Court stated that the decision *might* be different (although it did not so decide) when a witness refuses to testify before a committee without a quorum since a witness has more cause to fear that some committee members, unrestrained by a majority, will exceed their powers than a person who is merely required to turn over documents (339 U.S. at 332, note 8). We submit, however, that there is little, if any, difference. If no quorum is present, a witness called to testify can make this objection at the outset and then refuse to answer any questions until a quorum appears. He is therefore in little danger of being abused by a minority of the committee's members. In any event, a quorum was present when petitioner testified. If the Subcommittee had received permission from the Senate to hold the hearing while the Senate was in session and if it had either held the executive session in public or received permission to hold an executive session from the Judiciary Committee, there is no reason to believe that more members of the Subcommittee would have been present. And if the hearings had been held while the Senate was not in session, while more members might have appeared, petitioner had no right that they attend.

Lastly, petitioner argues that, while the lack of a

quorum is obvious, a witness cannot ascertain by visually looking at a committee that it has not been authorized by the Senate to hold a hearing while the Senate is in session or that the parent committee has not authorized an executive session. But petitioner could have readily ascertained whether such authority had been given by merely asking the Subcommittee. He cannot escape his obligation to raise his objections before the Subcommittee through his own negligence.

B. IN ANY EVENT, PETITIONER'S CONTENTIONS ARE WITHOUT MERIT

As for petitioner's first contention, Section 134(a) of the Legislative Reorganization Act of 1946* provides that any standing committee of the Senate, including any subcommittee, is authorized to hold hearings at any time even though sessions of the Senate are in progress. Section 134(c), relied upon by petitioner, provides that no standing committee of either branch of Congress, except the Committee on Rules of the House, shall sit without leave of such branch when the latter is in session. Read together, it appears that Section 134(a) is a jurisdictional grant of authority to committees and subcommittees, while Section 134(c) is a procedural limitation for the benefit of Congress. Thus, we submit, Section 134(c) was not intended to give rights to witnesses; it was enacted to assist Congress in securing the attendance of its members.

Even if Section 134(c) is construed to confer rights on witnesses, there was no violation of petitioner's rights because Senate Resolution 366 clearly

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*Act of August 2, 1946, c. 753, 60 Stat. 812, Title I, Section 134, 2 U.S.C. 190b.

authorized the hearing. Resolution 366, which was passed in 1950 and readopted by the Senate in subsequent sessions (after the Legislative Reorganization Act of 1946 was passed) provides that the Internal Security Subcommittee of the Judiciary Committee "is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate * * * as it deems advisable." Thus, the Subcommittee was clearly authorized—in the words of Section 134(c) was given "special leave"—to sit at any time, even while the Senate was in session.

As for petitioner's second contention, Section 133(f) of the Legislative Reorganization Act of 1946 requires that all hearings by standing committees or their subcommittees shall be public unless the committee authorizes an executive session by majority vote. This requirement, unlike that in Section 134 (c), may have been intended to protect the rights of witnesses, but it is nevertheless doubtful that it allows a witness to refuse to answer because permission for an executive session had not been obtained. In any event, while it appears that the executive session at which petitioner testified was not authorized by majority vote (J.A. 96), only counts 1 and 2 arose from questions asked during this session. Counts 3 through 14 arose from questions asked at the public session, which was not required to be authorized by majority vote. And since petitioner was given a general sentence which was less than he could have received on any one count, his conviction must be affirmed if any count is valid. *E.g., Barenblatt* v. *United States, supra,* 360 U.S. at 115.

III

THE SUBCOMMITTEE'S INVESTIGATION DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner contends (Pet. Br. 35), relying entirely upon the brief of the petitioner in *Shelton* v. *United States*, No. 9, this Term, pp. 29–57, that the Subcommittee's investigation violated his rights under the First Amendment. As we have shown in our brief in *Shelton*, pp. 48–49, this contention is without merit.

In addition, we submit that the two principal arguments under the First Amendment made by the petitioner in *Shelton* are even more clearly inapplicable to the present case. First, the petitioner in *Shelton* claims (Pet. Br. in No. 9, pp. 53–56) that the Subcommittee was not investigating Communist activities in news media but the news media themselves and, more exactly, the New York Times. While we have shown in our brief in *Shelton*, pp. 49–50, that this claim is erroneous, it is without even the slightest factual support in this case. Unlike in *Shelton*, the questions which petitioner refused to answer were not directly related to Communist activity in the news media field; for the subject under inquiry which was described to petitioner at the hearings did not concern news media at all. As we shall see (pp. 37–41), the Subcommittee stated to petitioner that it was investigating the organization of the Communist Party, Communist activities in the

United States generally, and, more particularly, petitioner's Party activities in the South.*

Second, the petitioner in *Shelton* maintains (Pet Br. in No. 9, pp. 29–53) that the Subcommittee did not have probable cause to subpoena him. While we have shown in our brief in *Shelton*, pp. 50–62, that the Subcommittee did have a reasonable basis for believing that the witness had information of considerable value to it, this is even clearer in the instant case. For, as we have described in the Statement, *supra*, pp. 4–5, the Subcommittee had abundant and detailed information at the time it subpoenaed petitioner that he was a member of the Communist Party who was participating in numerous Party activities.

IV

THE QUESTIONS PETITIONER REFUSED TO ANSWER WERE PERTINENT TO THE SUBJECTS UNDER INQUIRY AND THIS PERTINENCY WAS MADE CLEAR TO PETITIONER BY THE SUBCOMMITTEE

Petitioner contends (Pet. Br. 16–31) that (1) the Subcommittee failed to apprise him, when he appeared before it, of the subject under inquiry and of the pertinency to this subject of the questions he refused to answer, and that (2) the government failed to prove at his trial what was the subject under inquiry

* The Subcommittee counsel did testify at the trial that one of the purposes of the investigation was to discover Communist infiltration of news media. The questions asked petitioner do not directly relate to this subject except for the preliminary questions whether petitioner was or had been a Communist (see *infra*, p. 45). Presumably, if petitioner had cooperated with the Subcommittee by answering its questions, subsequent questions would have explored this subject.

and to establish the pertinency of the questions involved in the indictment to this subject. Both contentions are untenable.

A. PETITIONER FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS WHEN HE APPEARED BEFORE THE SUBCOMMITTEE AND THEREFORE CANNOT CLAIM AT HIS TRIAL THAT HE WAS NOT APPRISED OF THEIR PERTINENCY. IN ANY EVENT, HE WAS APPRISED OF THEIR PERTINENCY

1. As we have argued in our brief in *Shelton* v. *United States, supra*, pp. 25–29, a witness before a Congressional committee cannot claim that the committee has failed to apprise him of the subject under inquiry and the pertinency of the questions to this subject, unless he raises the issue of pertinency before the committee itself. *Barenblatt* v. *United States, supra*, 360 U.S. at 123–124; *Deutch* v. *United States*, 367 U.S. 456, 469. He cannot wait until trial to raise an objection which the committee could easily remedy.

Before the Subcommittee petitioner failed to object to the questions on ground of pertinency. His lengthy statement of legal argument and authorities (J.A. 41–50), which was obviously prepared by or at least with the help of petitioner's counsel, attempted to justify his refusal to answer entirely on constitutional grounds (see the Statement, *supra*, p. 6). The only suggestion of an objection to pertinency is the statement that petitioner "might wish to * * * challenge the pertinency of the question to the investigation" (J.A. 48). Considering the very same statement in a substantially similar legal memorandum,[10]

[10] See the record in *Barenblatt* v. *United States*, No. 35, Oct. Term, 1958, pp. 227–235.

this Court held in *Barenblatt* that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, and buried as they were in the context of [the witness'] general challenge to the power of the Subcommittee * * *" (360 U.S. at 124). Therefore, here, as in *Barenblatt,* the witness failed "to trigger what would have been the Subcommittee's reciprocal obligation" to explain the pertinency of the questions, and the witness is foreclosed from raising the issue for the first time in the contempt proceeding. *Ibid.*

2. In any event, no reasonable man in petitioner's situation—and certainly not one as articulate and intelligent as petitioner, who was also represented by experienced counsel—could have had any real doubt as to the subject under inquiry. Before he appeared at the executive session, the counsel who represented him at the hearing had telephoned counsel for the Subcommittee, had been informed in general terms as to the subject matter of the inquiry, and had indicated that he understood. (See *supra,* p. 5). At the brief executive session on March 19, 1956, petitioner presented a written statement of objections which revealed that he understood that the Subcommittee intended to inquire about his "political beliefs" and his "associational activities" (J.A. 41–42). As this Court stated in *Barenblatt* with regard to a substantially identical memorandum, "In light of his prepared memorandum of constitutional objec-

tions there can be no doubt that this petitioner was well aware of the Subcommittee's authority and purpose to question him as it did" (360 U.S. at 124).

It is clear, therefore, that petitioner knew, at the time he testified at the executive session, that the Subcommittee was subpoenaing him concerning Communist activities generally. He was asked and refused to answer at the executive session whether he was then an active Communist and whether he had been membership director of a specified branch of the Party in 1943 (counts 1 and 2). Just as in *Barenblatt,* where a Congressional Committee was investigating Communist activities in the field of education, the pertinency of the "questions as to [the witness'] own Communist Party affiliations * * * was clear beyond doubt" (360 U.S. at 125).

Any doubt in petitioner's mind concerning the subject under inquiry was surely cleared up when the Subcommittee counsel read to petitioner, at the public hearing, the opening statement of the Chairman at a previous public session with regard to "the purpose of the particular series of hearings" (J.A. 21). Included in the statement were these remarks (J.A. 22):

> We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their net-

work in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures.

* * * * *

We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and the composition of our own Government here [in order to enable the Subcommittee to make recommendation, as to whether the Internal Security Act of 1950 * * * should be repealed, amended or revised, or new laws enacted."

After petitioner answered questions concerning his present and previous employment, Subcommittee counsel stated (J.A. 32):

Mr. Chairman, this committee has been informed that Mr. Liveright and his wife were active in the Communist Party of New York City, and that at the time and date they moved to the South, they were formally asked by their Communist Party superiors to keep away from formal associations with the Communist Party at that time in their activities.

* * * * *

The purpose of subpoenaing this witness and asking him the following questions is to determine to what extent Mr. Liveright's activities have been carried out in New Orleans in the framework of the Communist Party and to

> what extent they have been carried out in some other framework.[11]

Petitioner then refused to answer whether he was then or had ever been a Communist (counts 3 and 4). The Chairman explained (J.A. 33):

> The question, Mr. Liveright, is very pertinent. We are attempting to see what amendments are needed to the Internal Security Act. In addition, and as a part of that, we are tracing the activities of the Communist Party in the United States.
>
> Our information is, sir, that you were sent South and placed there with your wife on a mission for the Communist Party, and were told by your superiors not to become involved with a Communist cell that was a professional group in the city of New Orleans, but the word was used by your superiors to stay clean.

Thus, before petitioner finally refused to answer any of questions at the public session on which his indictment and conviction were primarily based, he was specifically told that the Subcommittee was questioning him about the Party's organization, its activ-

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[11] Petitioner suggests (Pet. Br. 18, note 6) that the statement of the Subcommittee counsel could not provide the subject under inquiry because there is no evidence that the Subcommittee had given him this authority. But the Subcommittee did not reject the subject under inquiry clearly stated by Subcommittee counsel; indeed, the Chairman immediately thereafter confirmed that this was the subject. Moreover, the Court relied heavily on statements made by employees of the committee to the witness explaining the subject under inquiry in both *Wilkinson* v. *United States*, 365 U.S. 399, 408, and *Braden* v. *United States*, 365 U.S. 431, 433, at note 3 (the "lengthy explanatory statement addressed contemporaneously to the petitioner" was made by the committee's staff director).

ities in the United States generally,"[11] and in particular about Party activities in the South."[12] Virtually all of the questions he refused to answer obviously related to these subjects. These questions, which were pertinent on their face, included whether petitioner was then or had ever been a member of the Communist Party (counts 3 and 4); whether he had been sent on a mission for the Communist Party into the South (count 5); whether he had been affiliated with a Communist cell of professional people in New Orleans (count 6); whether Party meetings had been held in his home in New Orleans (count 7); whether he had been membership director of the Party's Thomson-Hill branch (count 8); whether he had given money to th Communist Party (count 9); whether he had sent his children away from his home because a meeting of a Communist unit was being held there (count 12); when he had joined the Communist Party (count 13); and whether he was told by the Party leadership in New York "to stay clean in New Orleans" (count 14). In addition, before petitioner was asked the question involved in count 9—whether he had given money to the Communist Party—the Chairman had stated that

[11] Contrary to petitioner's contention (Pet. Br. 24), this subject was stated to petitioner in terms by the Chairman: "[W]e are tracing the activities of the Communist Party in the United States" (see *supra*, p. 40). Thus, we do not rely, as petitioner claims (see Pet. Br. 24–28), exclusively on the Chairman's opening statement, which, according to petitioner, is no more specific than the authorizing resolution (S. Res. 366, 81st Cong., 2d Sess.).

[12] Similar subjects under inquiry—Communist infiltration into basic industry in the South and Communist Party propaganda in the South—were involved in *Wilkinson* v. *United States*, 365 U.S. 399, 408, and *Braden* v. *United States*, 365 U.S. 431.

the Committee was desirous to know "how this conspiracy is financed" (J.A. 36).

Petitioner suggests (Pet. Br. 18) that the subject under inquiry stated by the Chairman was too broad, because it included all Communist activity in the United States. First, this contention would apply only to counts 1 and 2, which involve questions asked during the executive session. Before petitioner was directed to answer any of the questions at the public session, the Subcommittee counsel described a more specific area of Communist activities, within the subject of Communist activities generally, which the Subcommittee was investigating in particular, *i.e.*, Communist activities in the South (see *supra*, pp. 39–40). And, as we have noted (p. 19), the judgment below must be sustained if petitioner's conviction on any one count is valid.

Second, even as to counts 1 and 2, neither *Barenblatt* nor *Watkins* v. *United States*, 354 U.S. 178, suggests that Congressional committees must divide their investigations into various topics, each to be investigated at a separate hearing. Such a requirement would seriously interfere with the work of a committee which is attempting to investigate a large and interwoven problem such as Communist activities in the United States. For example, it may be very difficult for the committee to designate a particular hearing as Communist infiltration of the radio or of the press. Instead, *Barenblatt* and *Watkins* require only that "[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body * * * to state for the record the

subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanations must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." *Watkins* v. *United States,* 354 U.S. at 214–215; see *Barenblatt* v. *United States,* 360 U.S. at 124–125. Thus, the Court required, only as a procedural rule, that committees must state clearly the subject under inquiry. It did not lay down any substantive requirement as to what subjects Congressional committees could investigate.

Moreover, the underlying rationale for the requirement that a witness be apprised of the pertinency of the questions did not require the Subcommittee to be investigating, and state to petitioner that it was investigating, a narrowly defined subject. The statute (2 U.S.C. 192) requires that the questions be pertinent, in order to prevent the punishment of a witness for refusing to answer questions which were without relevancy or importance to the committee's legislative work. The reason for punishing witnesses who refuse, without proper legal justification, to answer questions propounded by Congressional committees is that such refusal obstructs the committee in gathering information needed to consider possible legislation. If the questions are not pertinent to the subject under inquiry, then the committee has not been obstructed. The Subcommittee here involved has the authority to consider, and does consider, legislation relating to all aspects of Communist activities (see *supra,* pp. 19–28). Thus, petitioner's refusal

to answer the questions involved in counts 1 and 2 obstructed the Subcommittee in its legislative responsibility of investigating Communist activities in the United States.

If the pertinency element of 2 U.S.C. 192 is satisfied by a general subject of inquiry, such as Communist activities, the requirement that a witness be clearly apprised of the pertinency of questions is likewise satisfied if this general subject is clearly stated and the questions are obviously pertinent to this subject. The rationale for requiring that the witness be apprised of the pertinency of the questions is to allow him to decide at the time the questions are asked whether he is legally required to answer. *Watkins* v. *United States, supra,* 354 U.S. at 208–209. Here, knowing that the subject under inquiry at the executive session was Communist activities generally, petitioner was easily able to ascertain that the questions he refused to answer were pertinent.

B. THE GOVERNMENT PROVED THAT THE QUESTIONS WERE PERTINENT TO THE SUBJECTS UNDER INQUIRY

We have shown above that petitioner was apprised that the subjects under inquiry were the organization of the Communist Party, its activities generally in the United States, and, more particularly, the Party's activities in the South. We have also pointed out that twelve out of the fourteen questions on which petitioner was convicted were on their face clearly pertinent to all of these subjects (see *supra,* pp. 38, 41). Since the Government introduced the transcript of the hearings at petitioner's trial (Gov. Ex. 7), it fully

proved that these questions were in fact pertinent to the subjects under inquiry. Moreover, the testimony at petitioner's trial showed that the other two questions—whether petitioner and his wife had rented a post office box in White Plains, New York, and whether it had been rented in the name of the Westchester County Committee for Ethel and Julius Rosenberg (counts 10 and 11)—were also pertinent to the investigation of the organization of the Communist Party and of Communist activities generally. For the Subcommittee counsel testified that the Subcommittee had information that these activities were part of an attempt to raise funds for Communist purposes (see *supra,* p. 4).

In addition to the subjects under inquiry of which the Subcommittee clearly apprised petitioner, the Subcommittee counsel testified at petitioner's trial that another reason for petitioner's appearance was Communist activities in the communications media (J.A. 88, 97, 101–102). The questions petitioner refused to answer concerning whether he was or had ever been a member of the Communist Party (counts 1, 3, and 4) were clearly pertinent to this subject.

Petitioner, in attempting to show that the unanswered questions were not pertinent, emphasizes (Pet. Br. 19–20) that the Subcommittee counsel stated at petitioner's trial that the subject under inquiry, at the hearings at which petitioner testified, was Communist activities in the United States generally (see J.A. 58, 60, 86, 90, 93). We submit, however, that these statements are not inconsistent with our contention that the particularized subject under inquiry when petitioner was questioned was Communist activity in the South.

The latter subject is obviously a portion of the more general subject of Communist activities. See our brief in *Shelton, supra,* p. 34. Petitioner also seeks to draw comfort (Pet. Br. 21) from the statements of the Assistant United States Attorney at the trial that the Subcommittee has never investigated any particular subject within the scope of its authority, *i.e.* within the subject of Communist activities generally. It would seem, however, that these statements (see J.A. 58, 60) meant only that the Subcommittee had the power to investigate Communist activities generally and exercised this power even when it was investigating a particular portion of the general subject. Petitioner never indicated in the district court that there was any inconsistency between the statement of the Assistant United States Attorney and the clear proof introduced by the government.

In any event, even if the government had proved only that the sole subject under inquiry was Communist activities in general, this would have been sufficient to establish the pertinency of the questions. As we have noted above (pp. 42–44), this Court has never required that a Congressional committee have a narrowly defined subject under inquiry. Instead, it is sufficient that the committee have a subject under inquiry which is within the investigatory authority given it by the Senate or House of Representatives. In answer, petitioner contends (Pet. Br. 24–28) that the *Watkins* and *Barenblatt* cases hold that the full scope of the Subcommittee's authority (Senate Resolution 366) is too vague to be a subject under inquiry for the purposes of 2 U.S.C. 192. But these cases

relate only to the issue of whether the witness was apprised of the subject under inquiry; they hold, in that connection, that the statement made to the witness, or the authorizing resolution itself, must be clear enough so he can ascertain the pertinency of the questions. They do *not* relate to the separate question of law (see *Deutch* v. *United States, supra,* 367 U.S. at 467–468) whether the questions were *in fact* pertinent, as 2 U.S.C. 192 requires. For this purpose, the government need only prove the subject under inquiry and the pertinency of the questions to the subject beyond a reasonable doubt, like any other element of the offense.

Here the government clearly met its burden of proof. There were statements in the record describing the subject of Communist activities in the United States more specifically than Senate Resolution 366. The Chairman of the Subcommittee told petitioner that the Subcommittee was "tracing the activities of the Communist Party in this United States" (see *supra,* p. 40). Similarly, the Subcommittee counsel testified at petitioner's trial that "[t]he subject matter of the investigation at all times is the activities of the Communist organization as it operates within the United States" (J.A. 90). Moreover, as we have seen (pp. 19–28), Senate Resolution 366, even more clearly than House Rule XI which was involved in *Watkins* and *Barenblatt,* conveys authority to investigate Communist activities generally. If Senate Resolution 366 confers this authority and if the government had proved only that the full scope of the reso-

lution was the subject under inquiry, the government would have proved a proper subject under inquiry. The questions petitioner refused to answer, we repeat, were clearly pertinent to this subject.[14]

V

PETITIONER WAS NOT ENTITLED TO DISMISSAL OF THE INDICTMENT OR A HEARING ON THE BASIS OF BROAD ALLEGATIONS THAT GOVERNMENT EMPLOYEES GENERALLY ARE BIASED

Petitioner contends (Pet. Br. 42–47) that the indictment should have been dismissed since the grand jury included government employees who were biased against him because the government's loyalty and security programs made them afraid to appear to be sympathetic with Communism. Alternatively, petitioner claims (Pet. Br. 46) that he was entitled to a hearing in the district court to allow him to prove bias. We show, however, in our brief in *Shelton* v. *United States*, *supra*, pp. 62–64, that a defendant is not entitled to dismissal of an indictment merely because government employees were on the grand jury. We have also shown in *Shelton*, pp. 64–76, that a defendant is entitled to a hearing to inquire into the

[14] Petitioner also contends (Pet. Br. 47–48) that the issue of pertinency should have been submitted to the jury rather than be decided by the trial judge. But as petitioner recognizes, this question was decided contrary to his position only last Term in *Braden* v. *United States*, *supra*, 365 U.S. at 436–437; accord, *Sinclair* v. *United States*, 279 U.S. 263, 299. Petitioner suggests that there is a distinction between this case and *Braden* in that here the government introduced oral evidence as to pertinency. But this was equally true in *Braden*. See the record in No. 54, Oct. Term, 1960, pp. 26, 30–37.

motives and beliefs of grand jurors—even if we assume, contrary to the holdings of numerous cases, that a defendant is sometimes entitled to such a hearing—*only* when he alleges specific and convincing facts of strong bias in individual grand jurors. Here, as in *Shelton* (see our brief in *Shelton*, pp. 76–78), petitioner's Motion to Dismiss the Indictment (J.A. 4) and accompanying affidavit (which is virtually identical with the affidavit in *Shelton* v. *United States*, *supra* (see the record in No. 9, pp. 4–8)) did not allege bias or fear with regard to any individual grand jurors and did not even state any specific facts of fear or intimidation among government employees generally resulting from the security program which petitioner would show if a hearing were granted. In these circumstances, the trial court properly refused to grant petitioner a hearing to conduct a general exploration of the motives and beliefs of the grand jurors.[15]

VI

THE INDICTMENT WAS NOT REQUIRED TO SPECIFY THE SUBJECTS UNDER INQUIRY OR THE PERTINENCY OF THE QUESTIONS TO THESE SUBJECTS, OR TO ALLEGE THAT PETITIONER'S REFUSAL TO ANSWER WAS WILFUL

The indictment alleged that the questions petitioner refused to answer "were pertinent to the question then under inquiry" and that "the defendant unlawfully refused to answer those pertinent questions" (J.A. 1). Petitioner claims (Pet. Br. 16) that the

[15] Petitioner also states (Pet. Br. 47), but does not argue, that the trial court erred in denying his motion to disqualify for cause government employees as petit jurors. As our brief in *Shelton* showed, p. 63, this Court has three times rejected this contention, once in a case virtually identical to that involved here. *Dennis* v. *United States*, 339 U.S. 162.

indictment was invalid because it failed (1) to specify the subject under inquiry when petitioner testified, (2) to specify the pertinency of the questions he refused to answer to this subject, and (3) to allege that his refusal to answer was wilful.

In our brief in *Shelton* v. *United States*, *supra*, pp. 78–83, we argue that petitioner's contention that the indictment was required to state the specific subjects under inquiry is inconsistent with Rule 7(c) of the Federal Rules of Criminal Procedure and with decisions both of this Court and the courts of appeals. For the same reasons, an indictment which states that the questions are pertinent to the subjects under inquiry need not provide the reasoning underlying this allegation of pertinency.

Petitioner's contention that the indictment must specifically state that the witness' refusal to answer is "wilful" has been repeatedly rejected. *United States* v. *Deutch*, 253 F. 2d 853 (C.A. D.C.); *Sacher* v. *United States*, 240 F. 2d 46, 53, 252 F. 2d 828 (C.A. D.C.); *Barenblatt* v. *United States*, 240 F. 2d 875, 878 (C.A. D.C.), reversed on other grounds, 354 U.S. 930.[18] While it is true that, where wilfulness is an element of the crime, the requirement cannot be ignored in the indictment, it is also true that the charge may include either that term or words of simi-

[18] The petitioner in *Price* v. *United States*, *supra*, relies (Pet. Br. in No. 12, p. 20) on *United States* v. *Lamont*, 18 F.R.D. 27, 32 (S.D. N.Y.) affirmed, 236 F. 2d 312 (C.A. 2), which dismissed an indictment on the ground, *inter alia*, that it failed to allege that the refusals to answer were wilful. In *Lamont*, however, unlike this case, the indictment did not allege that the witness had *unlawfully* refused to answer.

lar import. The allegation here that petitioner "unlawfully" refused to answer is sufficient to allege that the refusal was wilful in the sense of deliberate and intentional. See *Howenstine* v. *United States*, 263 Fed. 1, 3–4 (C.A. 9); *Rumely* v. *United States*, 293 Fed. 532, 547–548 (C.A. 2); *Finn* v. *United States*, 256 F. 2d 304, 306–307 (C.A. 4); *Chow Bing Kew* v. *United States*, 248 F. 2d 466, 471–472 (C.A. 9); *Griffith* v. *United States*, 230 F. 2d 607 (C.A. 6). This Court has held under 2 U.S.C. 192 that the criminal intent needed to constitute the offense was "a deliberate, intentional refusal to answer." *Quinn* v. *United States*, 349 U.S. 155, 165; see *Sinclair* v. *United States*, 279 U.S. 263, 299.

VII

THE TRIAL COURT DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL BY DENYING HIS MOTION TO SUBPOENA THE SUBCOMMITTEE'S FILES AND BY REFUSING TO ALLOW HIM TO SECURE THE NAME OF A CONFIDENTIAL INFORMANT THROUGH CROSS-EXAMINATION

Petitioner contends (Pet. Br. 31–34) that he was deprived of a fair trial by the trial court's denial of his motion to subpoena the Subcommittee's files and its refusal to allow him to ask certain questions on cross-examination of the Subcommittee counsel concerning the information on the basis of which the Subcommittee subpoenaed petitioner.

A. Petitioner's motion to subpoena the records of the Subcommittee (J.A. 9) asked production of all written information in the Subcommittee's files (including confidential material) relating to petitioner or his wife. He sought these records on the ground

that they would show that the Subcommittee already had all the information it sought from petitioner and that therefore its purpose in subpoenaing petitioner was solely to harass and expose him (see J.A. 128). Therefore, petitioner reasoned, he would be able to show that the Subcommittee had had no legislative purpose and had violated his rights under the First Amendment (see J.A. 128–129).

The trial court properly denied this motion to produce. Even if the documents petitioner sought to obtain from the Subcommittee had contained the materials petitioner claimed, it is perfectly clear that the Subcommittee had a legislative purpose and that petitioner's First Amendment rights were not violated. This Court indicated in *Barenblatt* that a Congressional committee can subpoena a witness—at least when the investigation is in an area closely related to rights protected by the First Amendment—only if the committee has information giving reasonable ground to believe that the witness has information of value to the investigation. 360 U.S. at 134. After preliminary questions to identify the witness, Congressional committees usually ask the witness questions designed to determine whether the information possessed by the Subcommittee concerning the witness is accurate. If the witness states that the Subcommittee's information is accurate, this helps the Subcommittee in several ways. First, it virtually assures the correctness of the information the Subcommittee already has. Second, it helps to establish the validity of the sources from which the Subcommittee received the information and thereby indicates that other in-

formation provided by the same sources is also accurate. And, third, if the Subcommittee's information is accurate, the Subcommittee is in a position to ask further questions which are intended to provide entirely new information. Thus, even if petitioner had proved that the Subcommittee had all the information which petitioner could have provided in response to the questions he refused to answer, this information would still have been of considerable value to the Subcommittee. In short, the Subcommittee would have had a valid legislative purpose, and petitioner's First Amendment rights would not have been violated, even if the only information it could expect to obtain from petitioner was already known to it.

In addition, we submit, petitioner could not possibly have shown from the Subcommittee's files that the Subcommittee already had all the information known to petitioner. Petitioner refused to answer fourteen questions on which he was indicted and convicted. It is impossible to ascertain what information petitioner could have given in answer to these questions. And if petitioner had cooperated with the Subcommittee by answering questions, it is impossible to ascertain what further questioning the Subcommittee would have asked and what petitioner could have answered.

Petitioner, however, now claims that he needed to have the files of the Subcommittee to show that the Subcommittee had no basis to subpoena him. The first, and conclusive, answer to this contention is that petitioner did not present this reason to the trial court in support of the subpoena. Indeed, peti-

tioner argued a contradictory proposition. Instead of claiming that the Subcommittee had no basis on which to subpoena him, petitioner argued that the Subcommittee already had all the information which it sought to obtain from him. This argument implicitly assumes that this information was accurate.

Second, we submit that, even if petitioner had sought the subpoena on the ground that the Subcommittee had no probable cause to subpoena him, he was not entitled to obtain the files of the Subcommittee. Obviously, if Congressional committees were required to produce substantial portions of their files whenever they wished to enforce their directions to witnesses, the result would be to interfere seriously with Congressional investigations, for committees would not ordinarily be willing to disclose confidential information. Nevertheless, petitioner might have been entitled to these files if the issue of "probable cause" was an element of the criminal offense which the government was required to prove. This, however, is not the case. Instead, *Barenblatt* shows that "probable cause" is one of several considerations in determining whether First Amendment rights have been violated (see 360 U.S. at 134)." When the Court in *Barenblatt* and *Wilkinson* v. *United States*, 365 U.S. 399, referred to "dragnet procedures" and "probable cause" (360 U.S. at 134; 365 U.S. at 412), we believe that it did not mean to suggest that the sufficiency of the information and reasons which cause a committee to call a witness

[11] For a full discussion of the meaning of "probable cause" in this context, see the government's brief in *Shelton*, pp. 50–55.

should be subject to plenary judicial review. Rather, we believe, the Court intended at most to require only that Congressional committees present information showing a reasonable basis for their decision to subpoena the witness. See *Sacher* v. *United States*, 240 F. 2d 46, 50 (C.A. D.C.), reversed on other grounds, 354 U.S. 930. Here the Subcommittee counsel described in considerable detail the information possessed by the Subcommittee as to petitioner's Communist activities (see *supra*, pp. 4–5.) This evidence is sufficient for a court to decide whether the information described by the Subcommittee constitutes "probable cause," *i.e.* that it was reasonable for the Subcommittee to believe that it could obtain pertinent testimony from the witness.[18]

In short, we believe that the decision whether to subpoena a witness is mainly for the legislative body. To superimpose on a trial for contempt a full-scale trial of a committee's judgment would be an invasion of the prerogative of the legislature and a serious interference with Congressional investigations. The permissible scope of a Congressional investigation, which of necessity must proceed step by step, is not to be limited by the strict requirements of a criminal prosecution.

B. As to petitioner's contention that the trial court

[18] Petitioner does not claim in this Court that the Subcommittee in fact did not have probable cause to subpoena him. The Subcommittee's information that petitioner actively participated in Communist activities, particularly in the South (see *supra*, pp. 4–5) constituted reasonable basis for the Subcommittee to believe that he had information of considerable value to its investigation of the Party's organization, Communist activities generally, and particularly in the South.

denied him the right of cross-examination, he relies entirely (Pet. Br. 31–34) on the trial court's refusal to allow him to ask three questions of the Subcommittee counsel. The first asked for the name of the informant who had provided the Subcommittee with its information concerning petitioner (J.A. 98). The second and third questions, which were obviously related to the first question, were whether the informant was a professional or casual informant and the "full extent, in terms of time, of your conferences with this person with respect to [petitioner]" (J.A. 98, 100). The government objected to the latter question "on the theory of the protection of the confidential character of the informant's identity" (J.A. 100). The Subcommittee counsel had previously described the considerable information possessed by the Subcommittee concerning petitioner's Communist activities both on direct and cross-examination (J.A. 76–81, 99–101). On cross-examination, he further stated that this information "came from a very reliable informant"—"One whose information in the past proved to be so accurate that I would accept the information again" (J.A. 100). The court did allow, and apparently would have continued to allow, other similar questions designed to ascertain the reliability of the informant as long as they did not compromise his identity. All the questions which the trial court refused to allow petitioner to ask were directly related to the actual identity of a particular confidential informant.

A trial court, of course, has broad discretion in determining the scope of cross-examination, and a conviction can be reversed only if this discretion has been seriously abused. *E.g., Glasser* v. *United States,* 315 U.S. 60, 83. We submit that the trial court properly exercised its discretion in refusing to allow these particular questions on cross-examination. Petitioner's contention, if accepted, would mean that a Congressional committee would have to disclose its confidential informants in order to punish a contemptuous witness. Such an extreme interference with the legislative process is not warranted for the same reasons that petitioner was not entitled to subpoena the files of a Congressional committee (see *supra,* pp. 51–55). In both situations, petitioner's sole basis for seeking the confidential information is his unsupported hope that the information will discredit the detailed testimony of Subcommittee counsel concerning an issue which is not an element of the offense. It would clearly be going too far to hobble Congressional inquiries by permitting recalcitrant witnesses to demand revelation of the committee's prior information as the price of their testimony. A witness who refuses to answer questions asked by a Congressional committee is not entitled to the disclosure of the confidential files of the committee, either directly or by cross-examination of government witnesses, before he can be punished for contempt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ARCHIBALD COX,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
BRUCE J. TERRIS,
Assistant to the Solicitor General.
KEVIN T. MARONEY,
LEE B. ANDERSON,
Attorneys.

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